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Clk. Sup. Ct. U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. ~~256~~ and ~~257~~.

" ~~24~~ " ~~25~~

24 " 25.

ROBERT D. SILLIMAN, COMP'T,

vs.

THE HUDSON RIVER BRIDGE COMPANY, AT ALBANY;

And

FREDERICK M. COLEMAN, COMP'T,

vs.

THE HUDSON RIVER BRIDGE COMPANY, AT ALBANY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF NEW YORK.

GEO. S. GIDEON, Printer, 511 Ninth street, near Penn. Avenue.

Dis. & Remanded

Jan 27. 1862

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SUPREME COURT OF THE UNITED STATES.

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ROBERT D. SILLIMAN, COMP'T,

vs.

THE HUDSON RIVER BRIDGE COMPANY, AT ALBANY;

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FREDERICK M. COLEMAN, COMP'T,

vs.

THE HUDSON RIVER BRIDGE COMPANY, AT ALBANY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Northern District of New York.

At a stated term of the circuit court of the United States, begun and held at the City Hall, in the city of Albany, in and for the northern district of New York, on Tuesday, the eighteenth day of October, in the year one thousand eight hundred and fifty-nine.

Present, the Honorable Samuel Nelson and Nathan K. Hall, judges, &c.

ROBERT D. SILLIMAN
against
THE HUDSON RIVER BRIDGE COMPANY, AT ALBANY.

FREDERICK W. COLEMAN
against
THE SAME DEFENDANT.

These were suits in equity, in which the bills were filed in October, 1856, to obtain a decree for an injunction perpetually restraining the defendant from erecting a bridge across the Hudson river, at Albany, authorized by an act of the legislature of the State of New York, passed on the 9th day of April, 1856. The defendant further answers to both bills, to which general replications were filed and proofs taken, and both causes were brought on for hearing, and heard together, upon pleadings and proofs.

And upon the hearing of each of the said causes, the following questions have occurred, to wit:

First. Whether or not the court, under the Constitution and laws of the United States, has the power perpetually to restrain the erection of the bridge across the Hudson river, at Albany, proposed to be erected by the defendants in the manner provided for or authorized by the acts of the legislature of the State of New York, mentioned in the pleadings and proofs herein, in case the plaintiff, being the owner of vessels holding coasting licenses, shows to the satisfaction of the court that such bridge, if erected, will materially obstruct, delay, or hinder such vessels in the navigation of said river, while engaged in commerce between said State of New York and other States.

Second. Whether or not the evidence in this case shows that the bridge in controversy will, if erected, constitute a material obstruction and impediment to the navigation of the Hudson river for the vessels of the plaintiff, mentioned in the pleadings and proofs herein.

Third. Whether or not the defendant is entitled to a decree dismissing the bill, on the ground that the complainant has an adequate remedy at law for all injury he may sustain by reason of the erection of the said bridge, should the same be erected as proposed.

On which several questions, the opinions of the judges were opposed.

Whereupon, on motion of the defendants, by their counsel, that the points on which the disagreements hath happened may, during the said term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court of the United States, to be finally decided—

It is ordered that the said points of disagreement, together with the pleadings and proofs herein, be, and they hereby are, certified, according to the request of the defendants, as aforesaid, and of the act of Congress in that case made and provided.

In testimony whereof, I have hereto subscribed my name, and have hereunto affixed my official seal at my office, in the [L. S.] city of Utica, in said district, of this 18th day of October, A. D. 1859, and of our independence the 84th.

AUGUSTUS A. BOYCE, *Clerk.*

Supreme Court of U. S.

ROBERT D. SILLIMAN
vs.
THE HUDSON RIVER BRIDGE COMPANY, &c. } In Equity.

FREDERICK W. COLEMAN
vs.
THE HUDSON RIVER BRIDGE COMPANY, &c. } In Equity.

My return, under the within certificates, will appear by schedules A and B, as hereto annexed. The answer of

AUG. A. BOYCE, *Clerk.*

To the SUPREME COURT of the United States.

Filed 29 Nov., 1859.

68
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IN THE

Supreme Court of the United States,

ON A

CERTIFICATE OF DIVISION OF OPINION BY THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

IN EQUITY.

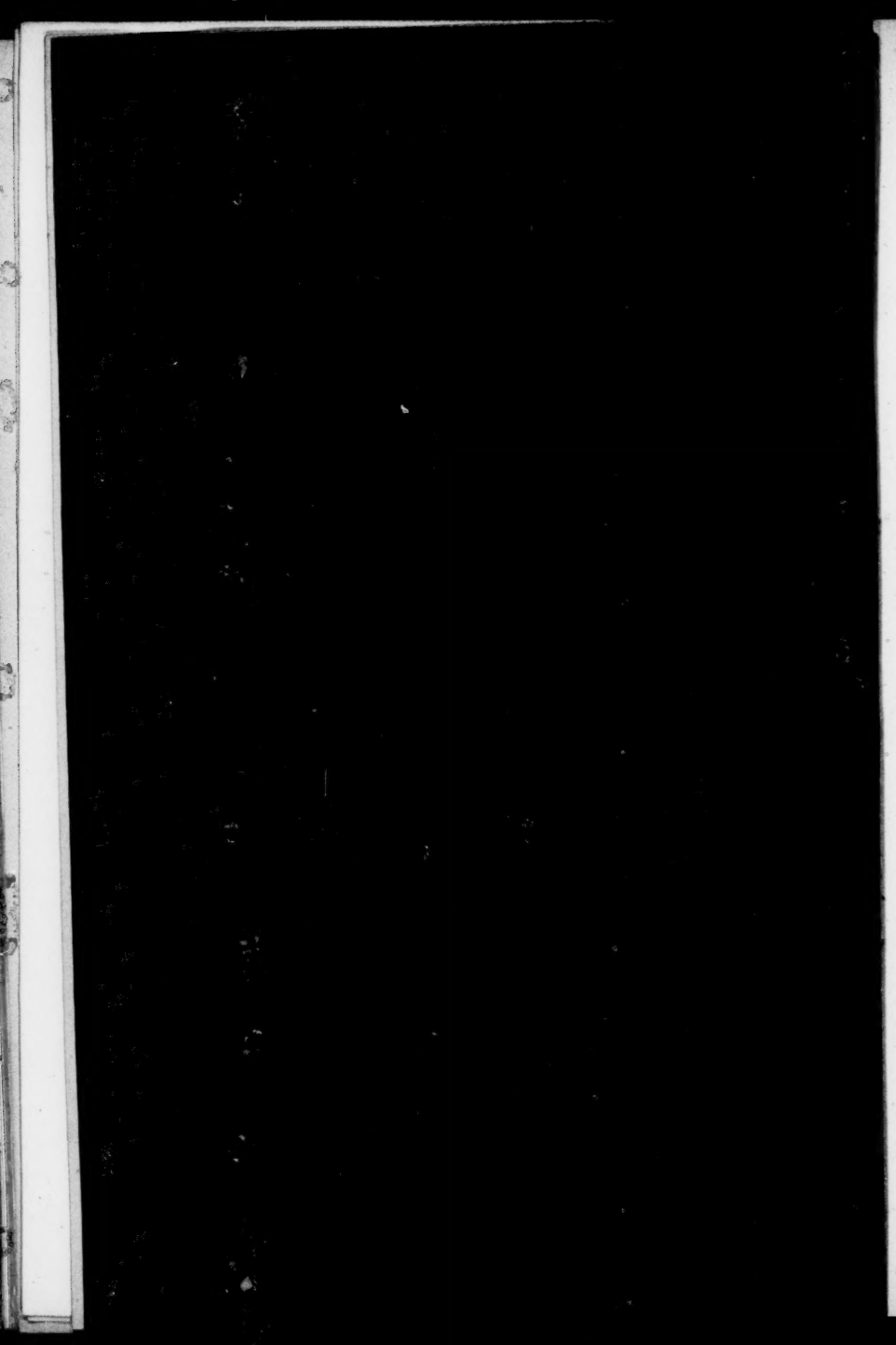
ROBERT D. SILLIMAN
agt.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

FREDERICK W. COLEMAN
agt.
THE SAME.

Statement of Case, Abstract of Pleadings, and FACTS Claimed to be Established on the part of the Defendant.

JOHN H. REYNOLDS, Solicitor for Defendant.

ALBANY:
MUNSELL & ROWLAND, 78 STATE STREET.
1859.



IN THE

Supreme Court of the United States,

ON A

CERTIFICATE OF DIVISION OF OPINION BY THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

IN EQUITY.

ROBERT D. SILLIMAN
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THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

FREDERICK W. COLEMAN
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THE SAME.

Statement of Case, Abstract of Pleadings, and FACTS Claimed to be Established on the part of the Defendant.

JOHN H. REYNOLDS, Solicitor for Defendant.

ALBANY:
MUNSELL & ROWLAND, 78 STATE STREET.
1859.

IN THE

SUPREME COURT OF THE UNITED STATES

ON

A Certificate of Division of Opinion by the Judges of the Circuit Court of the United States for the Northern District of New York.

IN EQUITY.

1

ROBERT D. SILLIMAN

against

THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

FREDERICK W. COLEMAN

against

THE SAME.

2

Statement of Case, Abstract of Pleadings and Proofs; and Facts Claimed to be Established on the Part of the Defendants.

FIRST—Brief History of Case, Abstract of Pleadings, etc., etc.

The bills in both the above causes were filed in the Circuit Court of the United States for the Northern District of New York, in October, 1856, for a decree restraining the defendant from erecting a bridge across the Hudson river at Albany, pursuant to an act, chap. 146, of the laws of the legislature of New York, for the year 1846. The defendant put in answers to both bills, to which general replications

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were filed and testimony taken, and both causes came on for
4 hearing upon pleadings and proofs. And upon the hearing the judges divided in opinion upon the whole case, both as to the law and the facts, and upon a certificate of such division, under the act of Congress, the cases come before this court. The leading features of the controversy, as disclosed by the pleadings, are as follows:

On the 9th of April, 1856, the Legislature of the state of
5 New York, passed an act creating the defendant a body corporate "for the purpose of erecting and maintaining a bridge, for the purposes of rail road travel and transportation across the Hudson river," from shore to shore, at Albany, from some point, to be fixed by commissioners for that purpose named in the act (§1).

Section 2 fixes the capital stock at $500,000, with au-
6 thority to rail road corporations to subscribe for the same, under certain limitations.

Section 3 names fourteen commissioners, to receive subscriptions to stock, and to apportion it among the subscribers.

Section 4 provides, that as soon as the capital stock shall be subscribed for, the commissioners shall give fifteen days'
7 notice of their intention to locate the bridge, and shall proceed to locate it, and make and file a certificate of such location with the Clerk of the County of Albany, and shall thereupon give notice of the first election of directors of said corporation.

Section 5 confers upon the commissioners, power to make all surveys and examinations, to enable them to select the
8 most advantageous site for the bridge, and appoint all engineers and agents for that purpose.

Sections 6 and 7 regulate the number of directors and the future elections, with sundry provisions touching officers and agents, calls upon stock, etc., etc.

Section 8 provides that the bridge shall be erected at an
9 elevation of at least 20 feet above common tide water, so as to allow under it the free passage of canal boats and

barges, without masts, with a draw of sufficient width to admit the free passage of the largest vessels navigating the river, and at least 200 feet wide—or two draws of at least 150 feet each; which draws are not to be obstructed by piers or otherwise, and in such a manner as to cause no substantial impediment or obstruction to the free navigation of said river.

(*By an act of April* 14, 1857, *the original act is so far amended as to allow one draw of* 180 *feet, or two of* 110 *feet each, in clear width, if the State Engineer of New York. and J. B. Jervis and O. H. Lee shall determine such width sufficient to admit the free passage of the largest vessel navigating the river. Pursuant to this amended act, the engineers named, made and filed a certificate, that one draw of* 180 *feet, or two of* 110 *each, clear width, was sufficient*).

Section 8 further provides that the Bridge Company shall at all times, during the season of navigation, cause the draw to be opened, and kept open, except for the passage of rail road trains of cars, and shut whenever the same may be necessary.

Boats and vessels wishing to pass the draw, shall at all times have preference over rail road trains.

Such draw shall be promptly opened to any boat or vessel on signal, if given before any rail road train shall have appeared and given signal of its intention to pass.

The Bridge Company are at all times to keep in readiness one or more steam boats or steam tugs, suitable for towing vessels through the draw; and shall tow all sail vessels through the draw, whenever requested to do so by the masters of the vessels, on their regular passage up and down the river, without charge; and shall afford such other facilities as may, in the judgment of the Canal Board be requisite, in passing the draw without hindrance and delay.

For any unnecessary delay, or refusal in opening and shutting the draw, the Bridge Company are made liable in treble damages to any party aggrieved.

From sundown to sunrise, during the season of naviga-

tion, suitable lights are to be maintained on the bridge, and for any neglect the company are made liable in damages.

Section 9 provides that the Bridge Company shall not
15 suffer any bars or obstructions which may be formed by reason of the bridge or piers thereof, to remain in the river, so as at any time to hinder or impede the free navigation thereof; and for any neglect in this respect, a penalty of $500 is imposed to the people of the state, together with all damages to any party aggrieved.

Section 10 authorizes the company to take and hold all
16 real estate necessary for the erection of the bridge and piers, etc., etc., and the approaches thereto, and may occupy the bed of the river for piers, &c.

Section 11 regulates the manner by which real estate for the use of the company may be acquired.

Section 12 provides, that after the completion of the bridge, tolls may be collected for crossing the same, on foot
17 and with wagons, cars or carriages of any kind, and with horses or other animals, as the directors may from time to time establish, subject to the approval of the Canal Board. The tolls to be so regulated, that they shall not yield an income to exceed 10 per cent.

Section 13 imposes a penalty for any willful injury to the bridge or its appurtenances.

Section 14 regulates the personal liability of stockhold-
18 ers and directors for debts.

Section 15 confers upon the Bridge Company the general powers, and subjects it to the liabilities regulated by the Revised Statutes.

Section 16 authorizes any rail road corporation, whose road has or shall have a terminus at, or shall run its trains to or from Albany, or East Albany, or shall run its trains in connection with any road having such terminus, shall be
19 permitted to use the bridge for rail road purposes, upon such terms as the directors of the several companies interested may agree, and if they can not agree, the terms shall be fixed by the Canal Board.

In pursuance of this act, the commissioners named therein, met at Albany, June 25, 1856, and received subscriptions to the whole capital stock of $500,000. And on the 21st of August, 1856, the commissioners located the bridge 20
on the Albany side at the foot of Exchange street, and on the easterly side at a point on the easterly branch of the river, known as Van Rensselaer's creek, 255 feet southerly from the centre of Partition street, in the village of Greenbush.

The bridge to cross the main channel by a straight line, nearly at right angles thereto, and to be connected with the fixed point on either side of the river by suitable curved 21
approaches.

The certificate of this determination was duly filed on the 21st day of August, 1856, and the company was completely organized by the election of directors on the 24th day of September, 1856.

On the 17th of October, 1856, the bills in these causes were filed and served; with a notice of motion for a pre- 22
liminary injunction according to the prayer thereof.

In the suit in which Silliman is complainant, it is alleged that he is a resident of Troy, N. Y., and is the part owner of seven barges, which are duly enrolled and licensed under the act of Congress, at Troy, which is a port of delivery.

That such vessels have been and are regularly engaged in navigating the Hudson river between Troy, Albany and 23
New York, and in carrying on the coasting trade between said ports, and that it is intended to continue such business.

That Silliman has resided in Troy 30 years, during which time he has been concerned in the navigation of the Hudson river between Troy and New York.

That he is engaged in business in Troy, dependent for t s prosperity upon the unobstructed navigation of the Hudson. 24
That he owns considerable property in Troy, the value of which will be greatly impaired by any permanent obstruction to the commerce and navigation of the river.

In the suit in which Coleman is complainant, it is alleged that he is a resident of Barnstable, in the state of Massachusetts. That he is the part owner and master of a
25 schooner called the "Vintage," which, on the 10th of March, 1856, was duly enrolled and licensed at Barnstable, to carry on the coasting trade. That since such enrollment the vessel has been engaged in the coasting trade between Barnstable and Albany and Troy, and intermediate places, and the ports of Boston and various other ports and places in the United States. That with said vessel he has been
26 accustomed to navigate the Hudson from its mouth to Troy, in the transportation of merchandise, and that he intends to continue such business.

With the difference above noticed, the allegations of both bills are in substance the same, and are as follows:

That the city of Albany is a port of delivery, situated upon the west bank of the Hudson, about six miles below Troy, and that the tide ebbs and flows up to and within the
27 city of Troy.

It is then alleged that the defendant became duly organized as a corporation, and the site of the bridge located by the commissioners, and the certificate of the commissioners is set out, *verbatim*.

It is further alleged that the defendant is making preparation and threatens and intends to erect said bridge across
28 the river, upon massive stone piers, several of which are to be about twenty feet in breadth, and placed in the main channel of the river, in the ordinary and necessary course of commerce and navigation. That at least two of the piers upon which the draw is to operate, must be of larger dimensions than the others—and that the defendant does not intend to elevate the bridge materially or any more than
29 20 feet above common tide, and charges that defendant threatens and intends to erect the bridge at an elevation of not more than 20 feet above common tide, and not sufficiently elevated above the stream as to admit the passage there-

under of steamers, masted vessels and tows daily accustomed to pass.

It is then averred that the erection and maintenance of the Bridge in the manner intended and threatened, will es- 30
sentially obstruct the navigation of the river—hinder navigators—increase the hazard and expense of navigating the river—derange and diminish trade and commerce—and operate as a common nuisance.

It is further alleged that the bed of the Hudson at, above and below the site of the bridge and between Troy and Al- 31
bany, is of light unstable sand, which is moved by the slightest action of the water, and by its irregular deposits yearly interrupts and changes the channel of the river at the places aforesaid.

That the river at Albany and its vicinity is subject to heavy annual freshets, which disturb and vary the channel. 32

That at the opening of the river in the spring immense and dangerous ice dams are formed at or near Albany, which interrupts the flow of the river in its ordinary channel, and create great alterations in the bed of the stream.

That for many years, the city of Troy has for much of each year, employed a steam dredge in clearing and pre- 33
serving the channel between Troy and Albany, from the changes and obstructions caused as alleged.

That the effect of said bridge, and its piers and foundations, will be to fill the channel with sand bars, and make the same intricate and fluctuating beyond the possibility of avoidance or reformation by the means indicated in the act 34
authorizing the bridge, so as to prevent a destructive interruption of commerce and navigation.

It is further alleged that the government of the United States, influenced by the commercial and national importance of the river, and possessing an extensive and costly fortification and arsenal located on the banks of the stream 35
opposite Troy, has from time to time made large appropriations for the improvements of its navigation, and several hundred thousand dollars have been recently expended for

that purpose between Troy and Albany, and above the site of the bridge.

It is also stated that Troy contains a population of nearly
36 40,000, and maintains manufacturing enterprises of *unusual* extent and importance, and conducts a commerce of *great variety, expansion and prosperity.*

That West Troy and Green Island, opposite Troy, contains a population of about 7000, and employ a large capital in manufactories and the lumber trade, and the commerce incident thereto.

37 That the Erie and Champlain canal unite with the river at West Troy, and a large proportion of the products arriving at tide water by canal, are there locked into the river, and the bridge crosses the Canal basin at Albany, below the outlet of said canals.

And it is charged that the erection and maintenance of said bridge will inflict great injury upon each and every of these interests.

38 It is further alleged, that the full breadth of the river opposite Albany is inadequate to the accomodation of the commerce and navigation conducted at and passing that locality.

That the contemplated enlargement of the Erie canal, the rapid increase in the population of the western states and in the facilities of transportation, must magnify the
39 vast trade which touches tide water at Troy and Albany, and passes upon the Hudson to the sea board, and that the erection of the bridge across the river and placing piers therein, will incommode trade, diminish its extent and increase the hazard and expenses of its prosecution.

That the precautionary measures provided by the act, professing to divert and diminish the injury to navigation,
40 will prove insufficient to protect it from injury.

That the construction of any form of draw bridge at Albany is impracticable, without material obstruction to navigation.

That there is no public necessity for a bridge at Albany

That general and local commerce, trade and travel are fully accommodated by existing facilities, and if not, it is entirely unnecessary to inflict upon Troy the apprehended injury. 41

A decree is then prayed for, to the effect that the act of the Legislature of New York, authorizing the construction of the bridge, is unconstitutional and void, and that the defendant may be perpetually enjoined from erecting any bridge, under the authority of such legislative act.

The answer of the defendant puts in issue every material allegation of the bill of complaint (except formal averments), 42 and avers, among other things, that the tides in the river at Troy and above Albany, are very inconsiderable, and do not ordinarily raise the waters above 10 or 12 inches.

It denies that the defendant threatens or intends to erect the bridge in the manner charged in the bill, and avers that it has not determined upon any precise plan, nor the number or size of piers, nor the extent of its elevation above 43 common tide; but that it does not intend to erect any bridge except strictly pursuant to its charter and which shall not materially obstruct navigation.

That it has not threatened and does not intend to erect a bridge at an elevation of not more than 20 feet above common tide, or one not of the elevation required by its charter; and it is averred that a bridge erected according 44 to its charter, will enable some of the steamers and all barges without masts navigating the river, to pass under, and others can pass through the draws, without any material impediment or obstruction.

It is admitted that between Albany and Troy, considerably above the site of the bridge, the bed of the river is of light, unstable sand, easily disturbed by the action of the water, and from this cause, at points removed from the in- 45 fluence of a bridge, the navigation is often interrupted.

It is also admitted that the river at Albany and vicinity, is subject to annual freshets, by which the channel in some parts is disturbed, but that at Albany, and for the space of

two miles in front of the city, about midway of which the bridge is located, the channel of the river is not disturbed in any material degree, by any of the causes mentioned.

46 That at Albany no ice dams are formed which alter the bed or channel of the river. Such occurrences are occasional, and at points in the river entirely beyond the influence of a bridge.

It is also admitted that for many years Troy has, for much of the year, employed a dredge in clearing and preserving the channel between Troy and Albany. That the channel of the river above Bath, and between it and Troy, is very

47 narrow, devious and uncertain; that sand bars form at every considerable freshet, so that no navigation would be practicable but for the constant employment of the dredge in the removal of sand bars, and it is by means of the use thereof that the commerce of Troy is passed.

The answers substantially put in issue the allegations of the bill touching the action of the government of the United

48 States, in respect to the Hudson river above Albany. It admits the location of an arsenal at West Troy, and that money has been expended in the attempt to improve the navigation, but that the works commenced for that object, were abandoned in an incomplete state, and suffered to go to decay.

In respect to the manufacturing and commercial import-

49 ance of Troy, West Troy and Green island, the allegations of the bill are put in issue.

It is denied that the channel of the river at Albany is inadequate to the accommodation of the commerce at that point, and avers that the bridge erected pursuant to the charter with the facilities provided for, will not in any respect interfere with any existing right of navigation.

50 It is denied that no necessity for a bridge at Albany exists, and alleges that the proper accommodations of travel and of the internal trade of the state, demand the erection and maintainance of a bridge at Albany, and that by its

erection and maintenance no material injury will be inflicted upon interests connected with the Hudson river.

It is submitted that the act of the Legislature authorizing the bridge, is constitutional and valid, and was a measure 51
of public necessity; and that it is within the power of the legislature of New York to authorize the construction of a bridge across the Hudson river at Albany for the convenience of its land commerce and travel, and that the complainants have no such exclusive rights in the waters of the Hudson, as entitle them to prevent other citizens from crossing, by means of a proper bridge.

It is denied that the complainants have any such interest 52
in the Hudson river as entitles him or them to maintain his bill, or to any relief whatever, and the defendant prays to be hence dismissed, &c., &c.

The complainants filed a general replication to the answer in each cause, and thereafter testimony was taken before commissioners.

A motion for a preliminary injunction was argued before 53
Mr. Justice Nelson, Nov. 17, 1856, and on the 25th day of July, 1857, a preliminary injunction was granted pursuant to the prayer of the bill.

On the 14th of April, 1857, the Legislature of New York passed an act to the effect, that the Bridge Company, instead of constructing their bridge with draws of the dimensions prescribed in the act of 1856, may construct 54
said bridge with a draw of such dimensions as the state engineer of New York, J. B. Jervis and O. H. Lee, civil engineers, or a majority shall determine, of sufficient width to admit the free passage of the largest vessels navigating the Hudson, and at least 180 feet in width, or with two draws of 110 feet each in clear width.

The engineers named in this act filed their determination 55
to the effect, that the bridge might be constructed with one draw of 180 feet wide, or with two of at least 110 feet clear width.

By stipulation, this act and the determination under it, is

to be regarded and treated as if formally made a part of the pleadings, or brought before the court on supplemental bill.

The testimony although taken in one case, is by stipulation agreed to be used in both cases, with the like effect as
56 if taken in both.

The points of disagreement between the judges of the Circuit Court appear in the record and are in substance: 1. Whether under the constitution and laws of the United States, the court has power to perpetually restrain the erection of a bridge at Albany, which is fully authorized by the Legislature of the state of New York. 2. Whether
57 upon the evidence it appears that the proposed bridge will materially hinder and delay vessels in navigating the river. And, 3d Whether if the proposed bridge shall prove injurious to the plaintiffs they have not an adequate remedy at law.

SECOND—Facts in relation to the Hudson River at Albany
58 **and vicinity, in respect to width, current, channel, bed, etc., etc.**

At Albany and for a distance of about two miles, the river is from 800 to 1000 feet wide, with a channel embracing nearly its entire width.

The current is direct and uniform. In low water the
59 velocity of the current is about eight-tenths of a mile per hour. In ordinary freshets, about two and eight-tenths miles per hour, and in the highest freshets about four miles per hour.

The surface velocities in each case are about one-tenth greater.

60 Page 82, Defendant's Depositions, fol. 406.
Page 86, Defendant's Depositions, fol. 427.

The bridge is located at about the middle of this wide and uniform channel, and may be seen by vessels approaching

it in either direction, at a distance of at least from one mile and a half to two miles.

Defendant's Depositions, page 84, fol. 441.
" " 168, fol. 830. 61
" " 189, fol. 931.
" " 196, fol. 961.

The bridge crosses the river at right angles with the current. Nearly the whole width of river in front of Albany and for a mile either way, affords sufficient water at ordinary stages for navigation.

Defendant's Depositions (Evidence of Dearstyne), pages 325, 62
327, fol. 1605.

On the west side of the river, at Albany, is a continuous line of docking for about the distance of two miles and a mile below the site of the bridge, and on the east side there is a parallel line of docks extending about one mile, and to a point below the site of the bridge.

By the erection of these docks, and some dredging on the 63
easterly shore in few instances, all tendency, at or about Albany, to the creation of sand bars, has disappeared and the channel is free from impediments.

The bed of the river is sandy and gravelly in its character, resting on a strata of blue clay, but for many years no sand bars have formed in front of the city, nor are any apprehended. 64

Below the village of Bath, and about one mile above the site of the bridge, about one-tenth of the water of the river deflects eastward, forming Van Rensselaer's creek, which again unites with the main channel near the village of Greenbush, below the bridge site. Upon the island formed by the Van Rensselaer creek and the main channel, the depots of the Western and Hudson River rail roads are lo- 65
cated, and between these depots, the easterly end of the bridge over the main channel is located.

On the west side of the river, below Bath, there is an opening in the Albany pier, which admits about the same

quantity of water into the Albany basin, as Van Rensselaer creek. The water from this basin discharges into the river
66 below Hamilton street and below the bridge.

Vide George E. Gray's Map.
Deposition of McAlpine, page 86, of Defendant's Depositions.

The obvious effect of the confinement of the waterway at Albany, by means of the uniform lines of docking upon either side, is to preserve the uniformity and directness of the currents at all stages of water. They operate in all
67 respects as the dykes erected in the various attempts to improve the channel of the river at other places, and preserve it from any tendency to the creation of sand bars, which are so common above, as well as to a considerable extent below Albany.

Vessels at Albany are in no danger of grounding, and no dredging is required to keep the channel open; and there is nothing in the condition of the river, its currents and
68 channel at this point, which furnishes any reasonable ground for the apprehension that the piers of a bridge, properly constructed, will tend to the creation of any sand bars that will in the slightest degree affect navigation.

Defendant's Depositions, Evidence of McAlpine, page 86.
" " " Morris, page 358.
" " " Johnson, page 400.

Nor is there any ground for the apprehension that the
69 erection of piers will tend to the formation of ice dams at Albany. On the contrary, all reliable opinions as well as experience, at places more exposed to accidents of this kind than Albany, tends to show that the piers of a bridge, with proper ice breakers, will operate to facilitate the passage of ice down the river rather than obstruct its passage.

Defendant's Dep. (E. F. Johnson), pages 86, 358, 400.

70 Besides, the damming up of ice at Albany has never occurred to any such extent as to affect the channel or bed of the stream.

In the devious and narrow channels, above and below, this result has been produced.

Ice dams have not formed at the Troy bridge. 71

It is only in shoal water that ice dams usually form, and if they do form in deep water, they do not affect or disturb the channel.

Above Bath, and between that point and Troy, the river is not navigable, except made so by the use of artificial means. It is filled with shoals, and its channel is narrow, crooked, and constantly shifting. This is the uniform testimony of all the witnesses on both sides. 72

It is thus described by Mr. McAlpine (defendant's depositions, page 88): "It is a very crooked and narrow channel in most places; I have frequently passed up it between Troy and Albany; it is subject to being filled by bars at almost every freshet, requiring annually to be removed by dredging; I think the channel is about 200 feet, and somewhat less in narrow places; the depth of water in these shallow places is from five to seven feet in low 73 water."

Philip P. Staats, navigator, says (defendant's depositions, page 161): "In ordinary times the channel is very narrow, with about seven feet of water; and in such times with a vessel drawing seven and eight feet of water, you can not pass a tow on the river except at certain places, and have to hold back for them to pass." And at page 171 (fol. 845), he says that the navigation between Troy and 74 Albany has, for the last few years, been kept open by the use of dredging machines.

Henry Bedell, pilot (deft's depositions, page 178, fol. 877), names several shallow and narrow places between Albany and Troy, and adds, "at these places, if you meet anything of a tow, you have to wait until the tow passes." At fol. 878, he says the navigation is kept open by means of a dredging machine (vide also pages 179, 181, 182). 75

William J. Ensign, pilot of the steamer New World

(deft's depositions, page 194, fol. 950), names the Fish-house bar and Kellogg shoals as some of the narrowest places, and says: " if there is a vessel of any kind lying in
76 the channel at these points, drawing any amount of water, it is difficult to pass it."

At fol. 951, he says that tows or vessels of more than fifty feet width, in ordinary water, find difficulty in passing each other at these places.

WILLIAM H MASTIN, mariner (deft's depositions, pages 205, 206, fols. 1008–9), says: " the navigation between Troy and Albany is maintained by dredging, and that ves-
77 sels are frequently aground there."

EDMUND ELLIS, pilot, gives evidence to the same effect.

Defendant's Depositions, pages 211 to 214, fols. 1031, 1033, 1037, 1043, 1047, 1048.

And to the same effect is the evidence of HENRY LEWIS, pilot.

Defendant's Depositions, page 216, fols. 1058 to 1063; page
78 219, fol. 1071.

HIRAM WHEELER, navigator (page 232, fols. 1126 to 1128).

LAWRENCE DEARSTYNE, ferry pilot at Albany (pages 324–25, fols. 1590–91).

The witnesses produced on the part of the complainants, generally concur in the evidence given by defendant in respect to navigation between Albany and Troy.

79 By a report of Major Delafield, of the United States Army, made to the War Department, under date of May 25th, 1853, produced in evidence on part of the complainants (complainants' depositions, pages 528 to 674), there is given a detailed statement of various shoals between Troy and Albany (pages 644 to 646), and the various stages of water during the years 1819, 1831, 1838, 1843 and 1852.

In 1825, a dredging machine was required to be used on
80 Van Buren's bar.

Complainants' Dep., page 637, fol. 3081.

From 1829 to 1831, "the Corporation of the city of Troy finding it necessary absolutely to resort to some means to secure a navigation to their city, caused dredging to be made on the shoals in the river, and expended, between 1829 and 81
1831, the sum of $5000 between Troy and Albany."

Delafield's Report, Comp. Depositions, page 637, fol. 3082.

At page 641, complainants' depositions, Delafield's report states that in 1851 a steam dredging machine had been purchased by the corporation of Troy, to be ready at any time to remove the shoals so frequently forming in the channel between Troy and Albany. The charge of this appa- 82
ratus was put in the hands of Capt. Smalley, who makes his home, in a great measure, on board the machine vessel, has it always in order for the moment necessity calls for its use, and by whose energy in its application, *Troy has continued to secure to herself a navigation which otherwise she could not have had.*

Complainants' Depositions, page 641, fols. 3103, 3104.

83

Alfred Mosher, a witness for complainants (complainants' dep., page 83, fol. 341), says: "I am acquainted with the channel of the Hudson river between Troy and Albany, *and the narrow places in it are too many to mention.*" Vessels are obliged to wait for each other in passing these places (fol. 342).

At some of the places the channel is about 150 feet wide and five feet deep (fols. 345, 347, 348, 349). 84

Fish house bar has about 100 feet width of channel, in the best of water and sometimes five feet deep (vide ev. of Mosher, pages 84 and 88).

So imperfect and difficult is the navigation between Troy and Albany that the tows from Troy and West Troy start down the river at the right time of the tide in order to get over the shoal places. 85

Ev. of Mosher, Complainants' Dep., page 89, fol. 374.
" " " page 123, fol. 518.

HENRY HAYWOOD, a witness for complainants (complainants' dep., page 136, fol. 573), says that at low water, navigation between Troy and Albany would be difficult, if
86 not impossible, without dredging.

Every witness interrogated on the subject agrees to the fact that navigation between Troy and Albany is imperfect and uncertain. That in sailing from Troy reference is had to the state of the tide; that vessels frequently ground; and, substantially, that without dredging no navigation could be maintained.

87 It is true also that the channel of the river for some distance below Albany is imperfect, but much better than above Albany.

Complainants' Depositions, page 330.

With the exception of the great bar at Castleton, formed by an ice dam in the springs of 1851–2, no great amount of
88 dredging is required to preserve navigation.

The general course of business indicates the difference between the channel above and below the bridge; it being clear that the large tows which pass down from Albany, without material difficulty or delay, could not be navigated in ordinary water between Troy and Albany.

With the exception of some unusual and extraordinary occurrence, such as the formation of the great bar in
89 1851–2, the amount of dredging to maintain navigation below Albany is comparatively trifling. Major Delafield (comp'ts evidence, page 642, folios 3106, 3107), says, that from 1845 to 1852, no dredging below Albany had been done.

In 1852, Mr. McAlpine, as State Engineer, excavated 45,636 cubic yards from Castleton bar, and 16,972 cubic yards from Cuyler's bar.

90 During the same time Captain Smalley excavated 25,000 yards of sand from a bar at the head of Mr. Van Buren's island, and 18,000 cubic yards from Washington bar. Afterwards, during same year, much was excavated at Kel-

logg shoals, Covell's folly, Round shoals, and on Washington bar.

It appears also that the channel below Albany is, as a 91
general thing, considerably wider than between Albany and Troy. It is nevertheless an imperfect navigation. Sand bars do form and obstruct the channel, and vessels in low water frequently ground.

See Defendant's Depositions, page 88.

Both above and below Albany, vessels and tows are, in 92
ordinary water, required to pass devious and undefined channels, not wider than the draw openings of the bridge

At Troy the state dam crosses the river. In this dam is a lock about 30 feet wide and 100 feet long, and through it vessels pass to and from Lansingburgh and Waterford and Troy, and canal boats from the Champlain canal, lock into the river, at Waterford, and pass through the lock in 93
the state dam down the river, and return north by the same route.

At West Troy, opposite the city of Troy, there is a side cut from the canals through which boats pass from the canal into the river, and from the river into the canal. At Port Schuyler, about one and a half miles below, there is another side cut used for the like purpose. 94

Complainants' Depositions, page 327, fol. 1464.

The river at and above Albany is subject to freshets. The spring freshets usually occur in March and April (compts. dep., page 119). Sometimes one in May. The fall freshets usually occur in October and November.

Complainants' Depositions, pages 152-3, fols. 650, 651.

The spring freshets usually occur before navigation be- 95
gins, and during the very high water there is and can be no navigation of the river.

The moderately high water from the spring floods continues from two to six weeks, in the months of March and April.

There are sometimes light floods during the summer, of small importance.

There are also fall freshets, but they are of short duration,
96 and do not ordinarily interfere with navigation.

THIRD—Facts in relation to the navigation at and above Albany; its kind, character, extent; the number and kind of vessels passing at different points, &c, &c.

The vessels which navigate the river at Albany, consist
97 of steam boats, schooners, sloops, propellers, barges and canal boats.

The largest class of vessels which come to Albany are the passenger steamers, and they land considerably below the bridge.

The largest vessels which go above Albany are the Troy passage steamers—the Francis Skiddy, Rip Van Winkle and Commodore. The Skiddy is of these the largest ves-
98 sel, and is 325 feet long and about 70 feet wide, and from 45 to 50 feet high above water to the top of her wheel house.

Complainants' Dep., page 245, fol. 1080.

Most of the navigation above Albany is conducted by towing. All laden vessels passing between Albany and Troy are towed up and down by small steamers averaging
99 from 80 to 100 feet long and about 30 wide.

Defendant's Dep., page 163, fol. 804.

Much the largest amount of business on the river above and at Albany is done by means of barges and canal boats towed by small steamers. The number of canal boats greatly exceed the number of barges.

Complainants' Dep. (H. Swarthout's), page 139, fol. 771.

100 The canal boats pass into the river at Troy, and without breaking bulk, are towed to Albany by small tugs, and then attached to larger tows and pass on to New York. Some

canal boats break bulk at Troy and Albany, and some pass into the river at Albany, and pass on to New York.

The size and capacity of canal boats is now greater than formerly. They now carry about 120 to 150 tons, and on the river are now taking the place of barges. 101

Complainants' Evidence, page 207, fol. 903; page 224, fol. 981–2; page 336, fol. 1504; page 527, fol. 6059.

Sail vessels are decreasing at and above Albany very fast. Barges are also decreasing, and the enlarged canal boats are taking their places. 102

Deft's Evidence, page 170, fols. 839, 840; page 188, fol. 930; page 195, fols. 955, 957; page 205, fols. 1006–7; page 207, fol. 1014; page 212, fol. 1038; page 219, fol. 1071; page 324, fol. 1587.

Complainants' Evidence, page 551, fol. 2578.

The only steam boats running above Albany not engaged in the business of towing, are the three Troy passenger boats, forming together one evening line between Troy and New York. 103

The average number of passengers carried by this line for the seasons of 1856 and 1857 was about 135 daily.

Defendants' Evidence, page 298, fol. 1459.

The capacity of these boats are about one-third greater than is necessary to accommodate the business. 104

Defendant's Evidence, page 299, fol. 1463.

The number of steamers and the amount of passenger business from Troy has decreased since 1845.

Complainant's Dep., pages 263, 264.

The number of vessels and steamers (not including canal boats) leaving Troy and West Troy daily during the season of navigation for places below Albany, is estimated at twenty-five. 105

Complainants' Dep., page 86, fol. 356.

The wood work of most of the steam vessels towing at and above Albany is low enough to enable them to pass

under the bridge, if their smoke pipes were so arranged as to let down, and they may be so arranged with little difficulty and at small expense.

106

Complainants' Depositions, page 91, fol. 383.
" " page 92, fol. 384.
" " (Robinson) page 237, fol. 1042.
" " (Oliver) page 283, fol. 1253.

It is estimated that there are 40 or 50 barges regularly engaged in the lumber business at West Troy, and some sail vessels—about 1-20th of the business is done in sail vessels.

107

Complainants' Depositions, page 105, fol. 443.
" " page 315, fol. 1403.

From one-half to two-thirds of the vessels towed between Troy and Albany and below are canal boats.

Complainants' Dep., (S. Betts) page 121, fol. 508.
" " (N. H. Noyes) page 152, fol. 646.
" " (R. Robinson) page 224, fol. 981.
" " (J. Oliver) p. 284, 295, fols. 1258, 1310.
" " (J. R. Getty) page 319, fol. 1427.

108

There is considerable freighting business between Waterford, Lansingburgh and New York, done in barges.

Complainants' Dep. (H. Swartwout), page 159, fol. 681.

The largest portion of freight from the Champlain canal, coming to Troy, enters the river at Waterford, and passes the sloop lock at the state dam and under the Troy bridge. The distance by canal to Troy, where they can lock into the river below the Troy bridge, is about the same.

109

Complainants' Depositions (H. Swartwout), page 171, fol. 738.

The ordinary height of barges above the water when loaded, is from two to four feet; when light, from six to seven feet; their upper works (including pilot house), when laden, is from 15 to 20 feet above water.

110

Complainants' Depositions (Swartwout), page 188, 190.

The principal freight coming from Troy comes from the canals, all of which can be passed through the canal to Albany and through the basin into the river below the bridge.

The daily arrivals of canal boats at Troy is about 40. They are increasing in size and tonnage. 111

Complainants' Depositions (Capt. Getty), page 334-5, fol. 1501 to 1504.

The extent of the commerce of Troy, as given by Mr. Hazard (complainants' depositions, page 338 to 341), is as follows:

(Owned at Troy) 4 sail vessels (3 sloops and 1 schooner), 39 barges, 2 propellers, 2 passenger steamboats. 112

Troy and Philadelphia line: 2 propellers and 8 barges.

Troy and Newburgh line: 1 propeller.

Troy and Boston line: 10 schooners, regular; 49 schooners, 9 sloops, 8 barges, transient.

350 transient vessels (estimated).

This statement is inflated and unreliable. It is mainly the result of conjecture, and not founded on personal knowledge. 113

See cross-examination of H. W. Hazard, page 344, et seq.

The result of a season's business of the 4 sail vessels, 39 barges and 2 propellers, owned at Troy, is put down in "Recapitulation" (page 340), at 621,460 tons of freight.

This business (as Hazard says), is conducted by *four* different firms (page 361, fol. 1635). 114

The amount estimated as carried by Silliman, Matthews & Co. for 1856 (which was the best business they ever had, twice as great as in 1857, page 348, fols. 1569, 1570), was below 101,648 tons (see page 337, fol. 1515), and the business of this firm is estimated as about equal to the others (page 361, fol. 1636).

Taking this estimate upon Mr. Hazard's own basis, the whole amount of tonnage would not exceed 400,000 tons, 115

per season in fact, as against 621,460 tons stated in his recapitulation.

116 But as against the accuracy of Hazard's statement and testimony, there is the evidence of Thos. A. Tillinghast, one of the Troy firms.

He says (page 97, fol. 409), that there are *four* heavy forwarding houses at Troy and *West Troy* (Mr. Hazard has *four* at Troy *alone*), and their names are Betts, West Troy, Silliman, Matthews & Co., E. C. Patterson & Co. and T. A.
117 Tillinghast & Co. of East Troy (page 98, fol. 410).

Mr. Tillinghast says the *largest* business is done by the three East Troy firms, and their business is almost equal (page 105, fol. 444), and the business of his firm for 1856 he puts at about 100,000 tons (page 107, fol. 452).

Upon this testimony the result of a season's business with the vessels owned at Troy, would be about 300,000 tons, *or less than one-half* in Mr. Hazard's "Recapitulation."

118 And the year 1856 was the largest business ever done at Troy, and more by one half than in 1857.

Mr. Betts of West Troy, although sworn as a witness for complainants (pages 108 to 128), was not interrogated as to the extent of his business.

The two passenger steam boats are put down in "Recapitulation" at 200 passages each and 400 for both,
119 and carrying 80,000 tons of freight during a season (see fols. 1531, 1532).

According to the evidence of Capt. Smith, of the Skiddy (comp'ts depositions, page 258, fol. 1135), the passenger boats do not carry on the average during the season, at each passage, to exceed 100 tons of freight.

For the 400 passages put down in recapitulation, this will make only 40,000 tons per season, in fact, as against
120 Mr. Hazard's estimate of 80,000 tons.

The result of a season's business of the *Troy and Philadelphia line* (fol. 1531), is put down by Mr. Hazard at a total of 68,480 tons.

DAVID MANN, complainants' witness, the agent of this line

at Troy, says (page 300, fol. 1330), that this line carries annually about 18,000 tons of freight, being over 50,000 tons less than Mr. Hazard's estimate.

121 The business of A. D. Agan & Co., Troy and Boston line, per season, is put down in Mr. Hazard's statement at 86,730 tons (fol. 1532), and passages of vessels 551, for the season of 240 days.

Mr. Hazard has no personal knowledge of this business (fol. 1564).

122 To carry the amount of freight estimated, would require *about twenty vessels each week*, during the entire season, each carrying *about* 160 *tons*.

Mr Agan, agent of this line, says, he *can not state the average number* of vessels engaged for him *per week*, sometimes *fourteen* or *fifteen per week* and sometimes *only three or four* (complainants' depositions, page 527, fol. 6059), and his vessels carry on the average about 150 tons, being of the tonnage of the enlarged canal boat.

123 Mr. Agan does not *claim over sixty vessels engaged* in his line (page 515, fol. 6000, but Mr. Hazard gives him seventy-six.

It is obvious that Mr. Hazard has estimated the eastern business double what it should be.

In his "Recapitulation" Mr. Hazard adds, "for transient vessels bringing coal and iron to this port, estimate 350 vessels, carrying 105,000 tons.

124 In respect to this item, Mr. Hazard thus speaks for himself (page 346, fol. 1561).

"38 *Question.*—Do you know that the transient vessels stated in your recapitulation, made 350 trips or 700 passages to and from Troy in A. D. 1857?

"*Answer.—I do not;* they are estimated in the recapitulation, *but I think they are estimated low.*

125 "39 *Question.*—How do you know they are estimated low?

"*Answer.—From the quantities of coal, &c., received here, as given by the proprietors of the several yards here.*

"40 *Question.*—What amount of coal and iron was received at Troy during the year 1857?

126 "*Answer.—I do not know.*"

The statement presented by Mr. Hazard is not sustained by any other witness.

There is no statement given in detail of the extent or number of vessels engaged in business at West Troy, Lansingburgh and Waterford.

The West Troy business, in the opinion of one or two witnesses, employs forty or fifty barges and some sail vessels—one-twentieth of the business being done by sail vessels; but this estimate is no doubt inflated, for having the means to arrive at the accurate number, the complainants rather repose on the mere estimates of interested and prejudiced witnesses.

127

Vessels propelled by sail, and doing business at or above Albany, are substantially obsolete.

128 Comp'ts Dep. (Ev. J. A. Durnou), page 551, fol. 2578.

More than one-half of such as continue in business, are towed to and from Troy in the same manner as barges and canal boats.

The principal freighting business between Troy, Albany, and New York, is done in barges and canal boats and towed by steamers. There are now about four canal boats em-

129 ployed to one barge, and canal boats are increasing while barges decrease.

The average number of boats towed at a time in ordinary water, between Troy and Albany, is about three or four. They sometimes take only one, and occasionally five or six; and in extreme cases as high as eight.

Complainants' Dep., page 542, fol. 2817.

130 This towing is done by a small class of steamers.

At Albany large tows are made up for New York, and taken by a larger class of steamers. The number of boats comprising a single New York tow vary from fifteen or

twenty to forty, principally barges and canal boats, much the largest proportion being canal boats.

Ev. of T. A. Tillinghast, Complainants' Dep. page 99. 131
Complainants' Dep., page 179, fol. 773.

Three lines of tows leave Albany for New York daily during the season of navigation. Two of these lines make up their tows above the opening in the Albany pier, and one below, all being above the site of the bridge

Complainants' Dep., page 96.
Defendant's Dep., pages 163, 164, 165. 132

There is room for making them up below the bridge, as well as above.

Above the bridge, and in the upper part of the city, the lumber business at Albany is conducted.

Complainants' Dep., page 96.

Below Exchange street the passage steamers, boats from ports on the river below and eastern ports, and boats engaged in coal business, have their docks. 133

Complainants' Dep., pages 102, 103.

Between Troy and New York rafts of timber are navigated during the season of navigation. This timber comes from the north and west, and at Troy is made up into large rafts and floated with the tide, or towed to New York by steamers. 134

The width of these rafts vary from 100 to 200 feet, and from 300 to 600 feet long. It is estimated that from twenty to forty rafts per season pass down the river.

Complainants' Dep., pages 124, 139, 151, 163, 422 to 428.

These rafts have no upper works, and may as easily pass under a bridge as any part of the river. Besides, they do not sail under a coasting license. 135

The great business of the river at and above Albany, in the movement of freight, depends upon the state canals. The commercial business of Troy and West Troy would

practically cease if the lock at Waterford, and the side cuts at West Troy and Port Schuyler were closed.

136 The Troy and West Troy barges are mainly employed in the transportation of canal freights transhipped at Troy and West Troy.

Complainants' Dep. (Ev. of Getty), page 334, fol. 1501.
" " (Ev. of Hazard), pages 343, 344.

More than one-half of the freights of the Troy and Eastern line of barges come from the state canals.

Complainants' Dep. (Ev. of Agan), page 527, fol. 6058.
137 " " " " page 517, fol. 6006.

The entire lumber business of Troy and West Troy, and Albany, depends upon the canals.

Complainants' Dep., page 348, fol. 1567.
" " pages 625, 626.

The total tons of property reaching the Hudson river by state canals in 1857, was 1,617,187.

138 Between 1850 and 1856, inclusive, the average was about 2,000,000 tons.

Defendant's Dep., page 415.

The total tons going from tide water by the canals in 1857, was 340,176 tons. For six years prior to 1857, the average was about 500,000 tons.

Defendant's Dep., page 313.

139 During 1857, 381,390 tons of property passed through the canals into the Hudson river and to New York, without breaking bulk (page 416).

To transport this amount of property would require from 15 to 20 canal boats per day, during the season of navigation.

Much the largest number of canal boats passing to and
140 from New York, without breaking bulk, enter and leave the river at West Troy.

Much of the lumber reaching tide water by canal, is transhipped at Albany, West Troy and East Troy. Some

boats, laden with lumber from the canal, pass on to New York.

Defendants' Dep., page 470.
Complainant's Dep., pages 625, 626.

141

About *one-tenth* of the canal boats arriving at Troy and West Troy break bulk, and about *one-half* of those arriving at Albany.

Complainants' Dep., page 296, fol. 1312.
" " page 334, fol. 1502.
" " page 335, fol. 1503.
" " page 225.

142

The number of clearances of canal boats in 1857, at West Troy, was 8,017; at Albany, 7,012. In 1856, at West Troy, 11,967; at Albany, 7,713. In 1855, at West Troy, 9,501; at Albany, 8,677. In 1854, at West Troy, 9,958; at Albany, 11,136; and for ten years prior they were about equal at either place.

Defendant's Depositions, page 416.

143

The amount of property arriving at Albany by canal, and the number of boats cleared and property shipped from Albany, north and west, for the year 1858, up to June 14, is considerably greater than the number and amount for a corresponding period of the years 1856 and 1857.

Defendant's Dep., page 469.

144

Canal boats following the canal to Albany may pass out of the Albany basin into the river at the foot of Hamilton street, a considerable distance below the site of the bridge, and may enter the canal from the river the same way.

Defendant's Depositions, page 470.
Complainants' Depositions, page 397.
" " page 296.
" " page 225.

145

The number of lockages at the sloop lock in the dam across the Hudson above Troy, for 1856, were 1,036; for 1857, 4, 146.

Defendant's Depositions, page 417.

But for the side cuts at West Troy, authorized by the state Legislature, all canal boats seeking tide water, would necessarily be obliged to reach it at Albany.

146 And it can not be doubted but that it is in the power of the state, so far to control its own internal improvements and regulate its own internal policy, as that for increasing the revenue of its canals, or promoting any other object deemed beneficial to its internal trade and travel—it may close the side cuts at West Troy and Port Schuyler and the lock at Waterford, and compel every canal boat seeking 147 tide water to pass over the canal to Albany.

Statement of the number and kinds of vessels passing different points in the river, at the site of the bridge, and above and below, at different seasons, with comments and explanations, etc.

148 The most active season of the year for business on the river is in the months of October and November.

The number of vessels of all kinds passing Bath ferry for eight days between 23d and 30th November, 1857, inclusive, was 690, being a daily average of 92.

Defendant's Depositions, page 466.

149 Of this number 269 were canal boats, being a daily average of 34; 56 schooners and sloops, daily average, 7; 73 barges, daily average, 9; 25 first class steamers, daily average, 3; 267 second class steamers, daily average, 33, all of which with a joint in their smoke pipe, could pass under a bridge 20 feet above water (page 465).

To accommodate all these vessels would not require the opening of a draw probably more than once an hour, certainly not more than twice.

150 During the same time, at Douw's point, about two miles below State street, Albany, the number of all kinds of vessels was 584, being a daily average of 78.

Defendant's Evidence, page 467.

Of this number, 92 were sloops and schooners, daily average, 11; 169 canal boats, daily average, 21; 123 barges, daily average, 15; 138 first class steamers, daily average, 17; 62 second class steamers, daily average, 8. 151

A draw opening twice an hour would probably accommodate all these vessels. Most of the large steamers never go above the site of the bridge, and so of some barges and sail vessels, and most of the vessels passing any given point are made into tows.

During 34 days between April 22d and May 31st, 1858, inclusive, 6,007 vessels of all classes passed the site of the bridge both up and down, at Exchange street, being an average of 176 daily. 152

Defendant's Depositions, pages 412, 413.

Of this number, 1960 were canal boats, and 563 barges, Total, 2523. Daily average of both, 76.

As these vessels necessarily were, and were in fact in tow of a steamer, the daily average of all passages requiring the opening of a draw, will be reduced 76, leaving it at 100, average. 153

This is the result if each steamer had in tow one barge or one canal boat requiring an opening for each barge or canal boat towed by a steamer.

It appears also that 329 vessels passed under sail; daily average, 9.

During same time 301 schooners passed (daily average, 8), and 316 sloops (daily average, 9). Total sailing vessels, 617. 154

Of this number of sailing vessels 329 sailed by; the balance, 288, were towed. Daily average, 8.

The number of passage steamers during same time was 60; daily average, 2. River tugs (vessels towing between Albany and New York), 384; daily average, 11. Troy tugs (vessels towing between Troy and Albany), 1126; daily average, 33. Harbor tugs (vessels towing about the Albany harbor), 1158; daily average, 34. Propellers 37; daily average, 1. 155

Upon this count, allowing one opening of the draw for each steamer and tug, propeller and vessel under sail, the
156 result of a day of 24 hours is as follows:

Draw opening for	passage steamers,	2
"	River tugs,	11
"	Troy tugs,	33
"	Harbor tugs,	34
"	Propeller,	1
"	Vessels, under sail,	9
	Total,	90

157

Or less than 4 per hour.

Of 19 tugs towing between Troy, Waterford and about Albany and New Baltimore, called "Troy tugs," 10 of them have the highest point of their wood work (the pilot house), less than 20 feet above water, and with joints in
158 their smoke pipes, could in ordinary water, pass under the bridge without opening the draw.

Defendant's Depositions, pages 456, 457, fols. 2239, 2241.

The wood work of two is 21 feet high, of two others 23 feet; two 25 feet; two 30 feet; and one 34 (the Baltic).

All the seven tugs towing in the harbor of Albany, called "harbor tugs," have wood work less than 20 feet
159 above water, and three of them have joints in their pipes. If the rest had joints all could pass under the bridge without a draw opening.

Defendant's Depositions, page 456, fol. 2240.

Of the harbor tugs three-sevenths, as at present rigged, will need no opening of the draw, and for this 15 openings should be deducted from the number given above, leaving
160 the daily average 75, or 3 per hour.

With joints in the smoke pipes of the other four harbor tugs and the 10 Troy tugs, whose wood work is under 20 feet high, there should be 51 openings deducted from the daily average of 90, leaving the necessary draw openings

39 in 24 hours, if the steamers and vessels passed singly. But under ordinary circumstances several may pass at one opening.

161 The pilot houses of two harbor steamers are so arranged as to be lowered if necessary.

Defendant's Depositions, page 455, fol. 2235–6.

162 The upper decks of the largest river barges are not to exceed 17½ above water, when light, and most of them are lower, with pilot houses capable of being lowered. At least eight-tenths of the river barges could pass under a bridge 20 feet above water.

Defendant's Depositions, pages 426, 427.

163 For six days, from June 4th to June 10th, inclusive, between 7 o'clock, A. M. to 6 P. M., the passages at State street, of river tugs, Troy tugs, harbor tugs, propellers and vessels, under sail, were 393; allowing a draw opening for each vessel, the number of openings daily, would be 65.

Defendant's Depositions, page 459.

Of the 393 passages, 234 were by harbor tugs. Deducting these leaves 159 passages in six days, or a daily average of 26 (vide page 459).

164 For three days at Bath ferry, June 11th, 12th and 14th, 1858, between 7 A. M. and 6 P. M., the number of Troy tugs passing, was 102, daily average 34; harbor tugs 33, daily average 11; 4 propellers and 13 vessels under sail.

Defendant's Depositions, page 459.

If the draw be opened for all, the daily openings are 50; and deducting harbor tugs, leave the draw openings between 30 and 40.

165 In reference to the reported number of passages of vessels, at the site of the bridge as above given, it is to be observed, that the number of passages is needlessly swolen, by the circumstance, that tugs towing vessels from Troy, to be made up into large tows for New York, in very many, and probably in most instances, passed down by Exchange street,

and then rounded to and passed up again, where the vessels in tow were made up with the large tows, and again passed the site of the bridge on its way to New York — thus giving
166 *three* passages for one vessel on the same trip, and making the commerce at Albany appear three times as large as it really is.

It also appears, that on many days when the most passages appear, many of the Troy tugs and harbor tugs, were engaged in sailing up and down the river past Exchange street, having nothing in tow, and apparently upon no business, except perhaps — knowing a watch was being kept —
167 to aid in swelling the number of passages.

Defendant's Depositions (A. S. Smith), page 447, fols. 2192-4; pages 452, 453, 454, fols. 2224-2225.
Evidence of W. S. Hawley, pages 436, 437, fol. 2144 to 2147.
Evidence of Rose, page 423, fols. 2076, 2077.

168 With a bridge erected, the large tows will probably be made up below, or they may be partly made up above, and pass the bridge and be then enlarged. In either event, towing vessels from Troy, will either round to above the bridge and leave their vessels, or passing under the bridge or through the draw, with the vessels in tow, attach them to the large New York tows below the bridge, for which operation there is plenty of room either above or below Exchange
169 street.

On the part of the complainants, a statement of the number of vessels passing Exchange street, between May 24th and June 3d, 1858, inclusive, for about 12 hours each day, upon the count of John B. Townsend of Troy, and his associates — is given in evidence.

Vide Complainants' Depositions, pages 588, 589, et. seq.

170 This statement is imperfect in many respects:

1st. It does not distinguish the kind of steam vessels passing, but classes all vessels propelled by steam under one head (page 589).

2d. It does not state how many vessels passed under sail, nor how many were towed.

3d. It does not state whether the tows passing, were made up for passing between Troy and Albany, or Albany and New York. 171

It moreover does not agree with the count, kept during the same time, by Rose and his associates.

It is to be noted, as a remarkable circumstance, that from the 18th day of May, down to the end of the count by Townsend, there was an unusual amount of passages by the Troy tugs and the harbor tugs, during the day time Many of them passed each day, up and down, with no apparent business. 172

Defendant's Depositions, evidence of Smith, page 447.
" page 441, fols. 2162, 2163.

Most of the steam boats (and more than three-fourths of them), passing in Mr. Townsend's count, were engaged between Troy and Albany, and about Albany, known as Troy and harbor tugs. 173

Complainants' Depositions, pages 592, 593, fols. 2819, 2822-3.

More than seven-eighths of the vessels towed were canal boats (page 592, fols. 2817).

Some of these steam vessels passed Exchange street twenty times in six hours; some fifteen times; some ten times, and some less (page 595, fol. 2831 to 2834). 174

These were not legitimate passages, for no towing steamer is accustomed to make so many trips per day. They do not average more than three to five trips per day.

Some of them were, in the language of the witness, "*engaged in passing this point*," and apparently doing nothing else (page 594, fol. 2825). 175

Many of the steam boats, embraced in the statement, were towing from Troy, passed Exchange street down, rounded

to and passed up again, and were then made up into tows for New York—thus tripling the passages for one and the same vessel on the same trip (page 591, fol. 2812).

176 The tugs "Uncle Ben," "Redfield," and various others of the steam boats, were towing boats from one point to another opposite Albany (page 598, fol. 2845).

In the number of tows is included not only the three large tows made up at Albany, but all others, whether *towed from Troy to Albany or between poin's at Albany* (fol. 2846).

It takes from *two* to *four* steam boats to start a large tow
177 for New York, and these are separately included in the list of steam boats passing Exchange street (page 596, fol. 2837).

As a further illustration of the needless activity of the small steamers in the harbor of Albany, during Mr. Townsend's term of service on the Albany Pier, take the 27th of May, for example, when between 7 A. M. and 7½ P. M.,
178 132 passages of steamers are reported.

Complainants' Dep., page 589.

On the same day, A S. Smith reports forty-two Troy tugs, fifty-six harbor tugs, between 8 A. M. and 6 P. M.; total (towing canal boats, barges, &c.) during ten hours, ninety-eight.

During same time, thirty-five canal boats, four barges
179 and eight sail vessels being towed, passed by. *Total, forty-three.*

Defendant's Dep., page 441.

If each steamer towed one vessel, it leaves *fifty-five steamers passing without anything in tow*, or "*engaged in passing this point*," and nothing else.

On the 28th of May, Townsend reports 113 steamers
180 passing between 6 A. M. and 7½ P. M.

On same day A. S. Smith reports, between 8 A. M. and 6 P. M., thirty-eight Troy tugs and forty harbor tugs; total in ten hours, seventy eight.

During same time he reports thirty-three canal boats, two

barges, and seven sail vessels under tow; total, forty-two (page 341).

If each steamer towed one vessel, *thirty-six steamers passed on this day without anything in tow.* 181

On the 29th of May, Townsend reports ninety-six steamers between 7 A. M., and 7½ P. M.

On the same day, between 8 A. M. and 6 P. M., A. S. Smith reports twenty-three Troy tugs and twenty-nine harbor tugs; total, fifty-two.

During same time he reports sixteen canal boats, four barges, three sailing vessels under tow; total, twenty-three. 182

If each steamer towed one vessel, *twenty-nine steamers passed on this day without anything in tow* (page 441).

The above illustrations could be greatly multiplied, to show that the actual and necessary openings of a draw at Albany, to accommodate its business, will be greatly less than *apparently* would be necessary, from the statements of the passing of different vessels, without explanation. 183

Mr. Townsend's statement is objectionable and unreliable because it is so general as to convey no real information in respect to the number of draw openings required.

It is the separate work of three persons, aggregated. The number of passages seen by each separately, at different times of day, is not given, 184

There is some ground for believing that, during the watch kept by Townsend, there was considerably more than ordinary activity among the small steam boats doing business with Troy, and about the harbor.

It is certain that before and immediately after, the passages were considerably less in number.

For six days immediately after Mr. Townsend closed his watch, the daily passages of Troy and harbor tugs were reduced about one-half, in the aggregate. 185

Defendant's Dep., page 459.

Moreover, it is apparent that the rounding to of the Troy

tows below Exchange street (the large tows being now made up above) unnecessarily, increases the apparent number of passages and vessels.

186 A bridge being built, the very large tows will probably be made up below, and a Troy tow will pass the bridge *but once*, instead of *three times.*

With the erection of a bridge, the two ferry boats of the Western and Hudson River rail roads, each of which now crosses the river with passengers and freight just above Exchange street, once at least every fifteen minutes (making eight passages across per hour, and more than the ordi-
187 nary passages of steamers up and down), will disappear; and by this, much more room will be afforded for vessels in the basin or at the pier above the bridge, or coming from Troy and rounding to for the purpose of reaching a dock, or approaching a large tow made up for New York.

The large tows, as they are accustomed to be made up at Albany, are a nuisance to all other navigators, and the in-
188 terests of navigation will be promoted, by compelling a reduction of their proportions or having them made up further down the river.

The very large tows coming from New York are now accustomed to break up below Albany, and often below Greenbush, where the boats comprising the tow destined for Troy are taken by the small steamers, and pass up the
189 river.

Defendant's Depositions, page 437, fol. 2146.
" " " 454, fol. 2229.

And there is but little difficulty in detaching vessels and diminishing a tow, to enable it to pass vessels aground or over shoal places, &c., &c.

Deft's Depositions, pages 169, 177, 185, 204, 212, 217.

190 It is estimated by intelligent navigators well acquainted with the river at Albany, that *three-fourths* of all the vessels navigating the river at Albany could pass under the proposed bridge, with the draw closed, and in this number is

embraced canal boats, Philadelphia coal boats, and barges without masts.

Defendant's Depositions (P. P. Staats), page 171, fol. 841.
" " " " 173, fol. 855. 191
" " (H. Bedell), " 178-188.
" " (W. J. Ensign), " 201-202.
" " (W. H. Maston), " 205.
" " (Wm. J. McAlpine), p. 81, 100-101.

The accuracy of this estimate will be seen by comparing the number of canal boats, barges, &c., with other vessels passing above the bridge. There are at least *four* canal boats to *one* barge, as shown by the statements, and canal 192
boats are increasing while barges are decreasing, and sailing vessels are comparatively obsolete.

Not one-half of the barges on the river have what are called *masts*, and these *masts* are not ordinarily used in propelling the vessel.

Barges without masts can readily pass under a bridge, elevated twenty feet above water, for their upper works 193
when the vessels are light, do not reach twenty feet high, and when laden, they are from four to six feet lower.

Vide Complainant's Depositions (Ev. of H. Swartwout), page 187, fol. 812; page 188, fol. 813; page 190, fol. 824.
Defendant's Depositions, page 419, 426, 462.

There is no difficulty, and it need be attended with but little inconvenience and expense, to so modify every barge 194
on the river, that it may pass under the bridge with the same facility as a canal boat.

FOURTH.—Facts in respect to the magnitude and extent of travel and traffic across the Hudson at Albany; the inconvenience, delays and dangers of a ferry; and the extensive public interests to be accommodated by a Bridge at Albany, etc., etc. 195

On the east shore of the river at Albany is the terminus of the Western Rail Road, and the Hudson River, connecting with New York and Boston; the Troy and Greenbush

(leased by the Hudson River R. R.), connecting with Troy and the north, also has its terminus at East Albany.

On the west shore, the New York Central Rail Road terminates; also, the Albany, Vermont and Canada Rail Road, which connects Albany with Rutland, Saratoga and the north. The Albany and Susquehanna Rail Road (connecting Albany with Binghamton), is in progress, and will be completed.

A very large amount of rail road travel and traffic, from the east and west, and from the south, seeks a passage over the river at Albany.

The facilities for this passage are now two steam ferry boats, owned respectively by the Western and the Hudson River rail roads.

It is shown by investigations made in the fall and winter of 1855–6, that the average number of persons daily passing over the rail road ferry at Albany, was 3,771.

(The passenger business up and down the river by the Troy passenger steamers, is a daily average of 135.)

Daily average of freights, 1,436½ tons. Equal to 140 car loads.

At this time (1855–6) the number of passengers crossing in a year was 1,175,612; freight per year, 448,176 tons; baggage, 7,920 tons; express freight, 11,768 tons; mails, 2,124 tons.

Vide Defendant's Depositions, pages 337, 338.

By the State Engineer's report for 1855, it appears that the number of passengers carried by four of the principal roads converging at Albany, viz: Albany and West Stockbridge (the Western), New York Central, Hudson River, and Troy and Greenbush, for the year 1855, was 4,655,955; freight, in tons, 1,116,514.

Of this amount, the New York Central carried, passengers, 2,717,477; freight, 670,073 tons. The Hudson River, passengers, 1,540,856; freight, 139,968.

See Defendant's Depositions, page 339.

Not included in the above is the business of the Albany,

Vermont and Canada Rail Road, which in 1855 carried 242,151 passengers, and 45,289 tons freight.

Not included in the freight crossing the river is an express company, called Merchants' Despatch, which in 1857 carried 12,194 tons. 201

Defendant's Depositions, page 339.

The amount of mails passing are now greater than in 1855.

Defendant's Depositions, page 340.

The expense of getting freight across the river at Albany from one rail road to another is 37½ cents per ton. 202

Defendant's Depositions, page 340, fol. 1668.

And in addition to transporting freight by ferry boats or carts across the river, three lighters are employed between the New York Central and Western Rail Road.

Defendant's Depositions, page 340, fol. 1669.

The number of tons of freight carried by the New York Central Rail Road, is increasing every year. For 99,605,836 tons carried one mile in 1855, 145,733,678 tons represents the business of 1857. 203

Defendant's Depositions, page 417.

The number of tons freight actually transported show a rapid annual increase of rail road business.

See Complainants' Depositions, page 581, fol. 2735.

See also, in respect to passenger business of 1856, New York Central. 204

See Complainants' Depositions, pages 582, 583.

This shows a very light decrease of total passenger business for this year as compared with 1855, although freight increased.

In 1857 the decrease in tolls from 1856 on the canal was $702,571, and the increase of freight receipts of New York Central was $231,508. 205

Defendant's Depositions, page 412.

The canal business of 1857 was nearly one half less than in 1856.

See statements, Complainants' Depositions, pages 584, 585, 586.

206 Defendant's Depositions, pages 413 to 416.

During about five months every year there is no navigation of the canals or river.

The passage of the river by ferry boats at all seasons under the most favorable circumstances is attended with delay, and inconvenience to passengers.

207 Rail road freight is required to be transhipped and carted across the river, or taken by lighters, at an expense per ton of $37\frac{1}{2}$ cents

At the breaking up of the river in the spring, and at its closing in the fall of each year, passengers and freight are subjected to great and ruinous delays. Passengers are detained from one to two days, and freight sometimes from 208 10 to 15 days, and usually from one to five days at a time.

Defendant's Depositions, page 341, fol. 1675.
" " pages 332, 333, 334.

The ferry boats loaded with passengers and freight are frequently detained by the large tows which are made up at Albany for New York, in the vicinity of the ferry ways.

209 Defendant's Depositions, page 353.
" " page 341, fol. 1672.

The passage of the ferry boats in times of freshets, is attended with various delays, and more or less danger to passengers.

The boats, for the accommodation of passengers, are obliged to pass the river at all times of day, as well as late 210 at night, on the arrival of trains from Boston and New York, with passengers for the west.

The large and valuable mails and express freight for the west and north usually pass with passenger trains, and are subjected to the same delays and peril.

For the season of 1858, *seven* regular passenger trains

and seven regular freight and emigrant trains leave Albany for the west. From Troy *three* passenger and *two* freight trains leave daily for the west.

Five regular passenger trains from Buffalo, and *one* local train from Schenectady arrive at Albany daily, and *six* freight (including one live stock) trains. 211

On the Western Rail Road (Albany and Boston), *three* regular passenger and *two* freight trains arrive at and depart from East Albany, daily.

On the Hudson River road, three regular passenger trains arrive and depart daily; also two freight trains, to which a passenger car is attached. 212

The Troy and Greenbush road being under a perpetual lease to the Hudson River road, runs in connection therewith, besides running several local trains between Troy and Albany.

The Albany, Vermont and Canada road runs several through and several local trains, daily. 213

It is apparent from the history of rail road traffic and enterprise that Albany is the point, on the Hudson river, a which, passengers and freight between the east and west, seek passage across. All the extensive roads either way, centre at Albany. The freight and passenger business of each is constantly increasing, and the business interests requiring facilities for passing the river, at Albany, are daily becoming more important both in respect to passengers and freight, and this is so despite the efforts of cities like Troy to divert travel and traffic from its natural channels, and make themselves places of public importance. 214

There is some evidence given by the complainants respecting the facilities by rail road, over the Schenectady and Troy Rail Road — across the bridge at Troy — and through the city over the Troy Union, and the Troy and Greenbush, to connect at East Albany, with the Western and the Hudson River Rail Road. 215

In respect to this, it may be said that the Schenectady and Troy road has but a single track, is very crooked and

of heavy grades. It is not the natural way of travel and traffic, and while this road was owned by Troy, all its efforts were insufficient to give the road business enough to
216 pay its running expenses, and Troy was annually taxed to pay deficiencies.

Complainants' Depositions, pages 612, 613.

The road is now operated it is believed, to its full capacity, in the transportation of freight (few passengers go that way), and it is incapable of doing one tenth of the business of the New York Central road.

217 The bridge at Troy is the private property of the Rensselaer and Saratoga Rail Road Company, and has but a single rail road track.

The Troy and Greenbush is but a single track rail road.

The distance from Schenectady to East Albany by rail road, via Troy, is five or six miles greater than via Albany.

218 Complainants' Depositions, page 686.

In regarding the respective interests which have business across, and which passes up and down the river, with a view to a reasonable accommodation to both, the following suggestions are submitted:

1st. The passenger business on the river between Troy and New York is comparatively insignificant, and has
219 largely decreased since 1845.

2d. The rail road passenger business passing across at Albany is not only very large and extensive, but has been and is constantly and rapidly increasing.

3d. The freight business across the river is extensive and on the increase, and the facilities for passing freight and passengers are inadequate, inconvenient, expensive and
220 dangerous. Nothing but a bridge can supply the public necessity.

4th. In respect to freighting business on the river, it is to be observed, that in conducting it, sail vessels are practically ignored, and barges are gradually giving way to

canal boats. The business of the river depends largely upon the canals, and with the completion of the canal enlargement, the introduction of steam thereon, all through freight will pass on to New York without breaking bulk, and the river barges will become obsolete. The capacity of the enlarged canal boat is about equal to the ordinary barges. These boats will need no opening of the draw of a bridge at Albany. Hence the great and growing land traffic may be accommodated with a bridge, with greatly less inconvenience to the business of the river, than if that business was now conducted in the kind of vessels employed in former years. 221 222

5th. It is, moreover, certain, that in the movement of freight upon the river, delays of moderate duration are of vastly less importance than detentions to large numbers of passengers. The business of the whole country is so connected with and dependent upon the speed, certainty and regularity of rail road trains, that a "failure to connect," or the detention of a train is attended with serious consequences; whereas in the business of water navigation, it is a common circumstance for vessels, laden and unladen, to lie idle at their wharves for hours, days and weeks, and to be detained aground on sand bars, and by various other causes, without affecting seriously the business of navigation. In this business, regularity and certainty to an hour or a day is not important or expected, and the success of the business in no way depends upon it. It is impossible that a little delay at a draw bridge can seriously affect a commercial business worth preserving. 223 224

6th. The fact that rail roads are capable of being used for all seasons of the year, gives them vast importance over river navigation, which can be conducted only for two-thirds of a year. Speed is another important element, and the probable increase of rail road travel and traffic, for all time, is to be regarded in determining its importance, when compared with navigation at and above Albany. 225

Rail road trains are run upon time tables known to all men of business, and upon their certainty and regularity, the most extensive financial and commercial interests depend. 226 They are not only of vast and increasing importance in every aspect, but the certainty by which they are expected to reach distant points, is a chief element in their public utility.

On the other hand, the importance of river navigation does not in any great degree depend upon its moving with precision, nor does the arrival of vessels laden with feight 227 at any particular hour, form any element in the success of the business conducted in sloops, schooners, barges and canal boats.

228 **FIFTH—Facts in relation to draw bridges over navigable waters; their practical effect upon commerce and navigation; the facility with which they are operated, &c., &c.**

There are a very large number of draw bridges over navigable waters, in the United States, at points of more or less commercial importance.

Evidence of W. J. McAlpine, Defendant's Depositions, page 84.

229 As to their effect upon the business of the river, opinions vary with the prejudices of persons expressing them. As a general thing, navigators are hostile to draw bridges of all kinds, at all places and under all circumstances. To this however there are exceptions.

The location of the proposed bridge at Albany, all circumstances considered, is more favorable to its successful 230 operation, than any other draw bridge of any importance, of which any account is given.

THE CHICAGO BRIDGES.

Of the effect and operation of draw bridges, through which an extensive commerce passes, those at Chicago afford an example of some importance. 231

There are fifteen draw bridges over the Chicago river, within a distance of about 4 miles, and in the corporate limits of the city, through some of which most of the extensive commerce of that port passes.

Defendant's Depositions, pages 2, 3, 4, 6, fol. 30.
" page 13, fol. 63. 232

These bridges are of various forms of construction, with various width of draw. Clark street bridge gave originally a clear channel for the passage of vessels of 75 feet (fol. 10).

Randolph street bridge, a draw of 80 feet.
Van Buren street, " 75 "
Kenzie street, " 50 "

Clark street bridge, rebuilt in 1852, with a turn-table draw, giving two channels for passing vessels, each of 78 feet in the clear. The draw rests upon a pier in the centre of the river, 30 feet wide and 200 long. Two men open it in a minute (fol. 12). 233

Lake street bridge is of a like character, with a similar draw, giving two openings of 76 feet each.

Chicago avenue bridge was a double hoisting draw, giving a channel of 44 feet. It is now a float bridge. 234

The Wells street bridge has a turn-table draw, resting on a centre pier 35 feet wide and 220 feet long, giving two channels of 77 feet.

Rush street bridge is made of iron, with a turn-table draw, giving two channels of 80 feet each. The draw is operated by two men, who open and shut it in one minute. 235

Defendant's Depositions, page 4, fol. 17.

Rush and Wells street bridges are about 18 feet above low water mark, and canal boats and river tugs pass under

them without the draw being opened (fols. 18, 19). The draws are opened for steamers and sail vessels.

236 The principal part of the commerce of Chicago passes through Rush, Clark and Wells street bridges.

From 50 to 100 vessels pass these bridges daily, and not one in 50 are at all impeded in their progress.

Defendant's Depositions, page 120, fol. 596; page 131.
Defendant's Depositions, page 4, fol. 20; page 5, fol. 23; page 119, fol. 592; page 66, fol. 320; page 74, fol. 366.

237 It takes from 2 to 5 minutes for the vessel to pass, and sometimes 4 vessels pass—two each way—at the same opening of the draw.

Defendant's Depositions, page 8, fols. 37, 38.
" page 36, fol. 176.
" page 47, fols. 235, 237.
" page 111.

238 A thousand vessels pass these bridges safely, to one that receives injury (page 34, fol. 167; pages 119, 595; pages 124, 125, fol. 625; page 126.

The tugs towing on the Chicago river have joints in their smoke pipes (page 35, fol. 175).

500 or 600 sailing vessels, 30 or 40 propellers, and 6 to 8 steam boats, trade at Chicago during a season, and all of them pass some of the bridges.

239 Defendant's Depositions, page 59, fol. 294.
" page 109, fol. 545.

An accurate count of the draw openings, at the Clark street bridge, Chicago, for 30 days, ending Aug. 3d, 1856, shows 2,947 openings, daily average 98; and this is a fair average of the passages per season.

Defendant's Depositions, page 131.
" page 125, fol. 624.

240 The largest number of openings, for any one day, was 150. For 14 days out of the 30, the openings each day exceeded 100.

There is little current in the Chicago river, except in the spring freshets.

The river is narrow, averaging about 200 feet wide, and is quite crowded with vessels during the season of navigation. 241

Most of the detentions to vessels have occurred at the float bridges with narrow openings. With the pivot draw, giving two channels for the passage of vessels, no material difficulty or delay is experienced.

Notwithstanding the number of bridges across the river at Chicago, the value of property and the commercial business *above* the bridges, or some of them, has very largely increased and is still increasing. 242

Complainants' Depositions, pages 49, 50.

As to the practical effect and operation of the Chicago bridges, the following witnesses give evidence on the part of the defendant:

Dorastus Harper of Chicago, bridge builder and Superintendent of public works, pages 1 to 32. 243

Charles Spaulding of Chicago, engaged in building and repairing bridges, pages 32 to 45.

Andros B. Stone of Chicago, bridge builder, for 18 years, pages 45 to 58.

Bowen S. Shephard of Chicago, engaged in the shipping and vessel business, pages 58 to 61.

Thomas Dyer of Chicago, shipping merchant and Mayor of the city, pages 61 to 64. 244

James Chaloner of Chicago, a master mariner, pages 64 to 72.

Edward H. Wheaton of Chicago, master mariner, pages 72 to 77.

Wm. A. Ingles of Chicago, master mariner, pages 108 to 114. 245

Thomas Lewis of Chicago, formerly sailor, now bridge tender, pages 119 to 123.

Elihu Granger of Chicago, alderman, chairman of com-

mittee on bridges, Superintendent of public works, &c pages 123 to 131.

Each of the witnesses above named, state from actual observation and experience, that the bridges at Chicago present no substantial impediment or obstruction to vessels navigating the river. That vessels are seldom detained or injured by reason of the bridges.

246

On the part of the complainant the following witnesses were examined touching the Chicago bridges:

Wm. A. McPherson, Chicago, mariner, captain of a tug steamer.

247

Complainants' Depositions, pages 12 to 24.

Wm. N. Burton, Kenosha, Wisconsin, captain of a tug steamer, pages 25 to 55.

John W. Hibbard, Chicago, mariner, captain of a tug steamer, pages 55 to 70.

Alfred Mosher of West Troy, navigator, pages 76, 77, 79, 82, 83.

248

These witnesses say that the bridges are an obstruction to navigation. That vessels are sometimes detained and injured.

By reference to the cross-examination of these witnesses it will appear—

1st. That they testify with all the prejudice of navigators against draw bridges, and are men of very limited intelligence.

249

2d. The most of the detentions and accidents spoken of happened at the float bridges, which are admitted to have been of imperfect and improper construction.

3d. It is also apparent that for most of the detentions and accidents mentioned, the bridges were not responsible. It was generally the result of an unusual press of vessels in the river, and the carelessness of the navigators. In some instances by neglect of the bridge tenders, the draws were not opened in season.

250

4th. And these witnesses substantially admit that with

draws such as are required at Albany, no impediment would exist.

Vide particularly, Complainants' Depositions, page 12, fol. 44; page 15, fol. 53; page 16, fols. 57, 60; page 17, fol. 63; page 18, fol. 69; page 22, fol. 86; page 24, fol 93; pages 27, 33, fol. 130; page 37, fols. 145 to 147; pages 38, 40, 45, 48; page 52, fol. 216; page 53, fol. 218; page 56, fols. 230, 231; page 66. 251

THE ROCK ISLAND BRIDGE.

The Rock Island Bridge is for rail road purposes, and crosses the Mississippi river. Its length is 1582 feet, with a draw of 283 feet long, resting on a centre pier, giving two openings for the passage of vessels, of about 120 feet each. 252

Defendant's Dep., page 46, fol. 220.

The bridge is elevated about 28 feet above ordinary water, 31 to 33 above low water, and about 18 feet above high water. 253

In the ordinary stage of water the current at Rock Island is from 4 to 6 miles per hour (*greater than the current at Albany in the highest freshet*).

Defendant's Dep., page 48, f l. 239.
" " " 82, fol. 409.
" " " 104, fol. 520. 254

It takes two men from one minute and a half to three minutes to open the draw, and it can be opened in half a minute (page 82, fol. 408; page 105, fol. 522, 523).

The current of the river at Rock Island is not only rapid but does not run true with draw openings.

Most of the accidents which have occurred there have been occasioned by cross currents, bad management by navigators, and by reason of a false chart of the river, called the "St. Louis Chart," by which navigators were misled (page 107, 108). 255

The principal passages on the river at Rock Island are by steamers, having barges in tow.

Defendant's Dep., page 104, fol. 517.

256 As many as six coal boats and barges are taken down the river in tow of a steamer, without difficulty or danger, if the pilot understands the business of navigation.

Vide Evidence of H. Decker, pilot on the Mississippi.
Defendant's Dep., pages 152 to 135.

In reference to the influence and effect of the Rock Island Bridge upon the navigation of the river on the part of the
257 defendant, the following witnesses testify:

Andros B. Stone, bridge builder, page 48.
Wm. J. McAlpine, civil engineer, page 82.
Seth Gurney, Rock Island bridge tender, page 104.
Charles L. McAlpine, civil engineer, page 115.
Henry Decker, Mississippi pilot, pages 132 to 135.
B. B. Brayton, civil engineer, pages 135, 136.
258 John E. Henry, civil engineer, page 142 and
R. B. Mann, contractor, page 147.

All of whom have witnessed the practical operation of the bridge, and concur in saying that it presents no material obstruction to the navigation of the river.

On the part of the *complainant*, a single witness, Henry
259 A. Forse of Rock Island (captain of a steam boat running past the bridge), says the bridge is an injury to navigation.

Complainants' Dep., pages 1 to 12.

This witness was never detained or damaged by the bridge, nor has he ever seen a case of damage or detention, solely attributable to the bridge. The detentions and injuries at this point are occasion by the winds, and the cur-
260 rents and rocks in the river, and sometimes by reason of the extreme darkness of the nights, rendering navigation dangerous (vide fols. 6, 7, 19, 21, 24, 35, 37, 40).

OTHER DRAW BRIDGES.

Various other draw bridges, their operation and effect, are spoken of by different witnesses.

261 There is a draw in the rail road bridge over the Galena river at Galena, with two openings of 120 feet each.

Also one over the Maumee, at Toledo.

One at Cleveland, over the Cayahuagua.

For various others, see Defendant's Dep. (Wm. J. McAlpine), page 84; also A. B. Stone, page 45; C. L. McAlpine, page 115; B. B. Brayton, page 135; John E. Henry, page 141; R. B. Mann, page 145; Ellwood Morris, page 366-7; E. F. Johnson, page 390. 262

The draw bridge over the Schuylkill river, at Gray's Ferry, has passed 180 sailing vessels per day, the draw remaining open for each vessel, an average of $4\frac{1}{2}$ minutes.

Defendant's Dep., page 390, fol. 1916.

The actual experience at various places where important draw bridges have been erected, shows that in a favorable 263 location, with a properly constructed draw, operated with skill, there need be no material obstruction to the navigation of the river, if navigators give proper attention to the handling of their vessels.

As to the effect of the proposed bridge at Albany upon navigation, opinions (as is customary in such cases) vary, and much the largest space in the printed evidence on the 264 part of the complaint, is occupied by the *opinion* of navigators and others, as to the effect of the bridge at Albany. Many who give opinions never navigated or saw a vessel navigated through a draw bridge, and scarcely any ever passed a draw bridge of wide opening, proper construction and good management, and *none* ever passed a draw of the width proposed at Albany. 265

It is to be observed also, that nearly all the witnesses for the complainants are citizens of Troy (and real parties complainant) and vicinity, violently opposed to a bridge at Albany, and who have been a long time engaged in an

exciting and angry controversy about it; and give evidence under the influence of great prejudice against a bridge at Albany, and very exalted ideas of the city of Troy and its importance among the powers of the earth.

266 A leading feature in this evidence is this: that most of the adverse opinions as to the delays and dangers of a bridge at Albany, are based upon the idea that great freshets and high winds are the common conditions of the river, rather than the exception, and that the draw of the bridge is to be closed generally when vessels desire to pass. It has been the favorite theory of the complainants' witnesses to ima-
267 gine difficulties and dangers that never (or scarcely ever) exist, and found thereon opinions hostile to the feasibility of a bridge at Albany.

The most prominent ground of opposition is, that the commerce is so extensive as to render a draw incapable of passing it.

Some examples of this testimony it will be useful to refer
268 to as illustrating the whole.

ALFRED MOSHER, of West Troy, navigator, gives his opinion, that *night and day* during the season of navigation, vessels would require to pass the draw at Albany every *five minutes*—equal to 288 per day (page 85, fol. 355).

In a *high* freshet, with a *heavy* wind and the *draw* of the bridge *closed*, a steamer with a tow would be in danger of
269 getting foul of the bridge (page 88, fol. 368).

There is no difficulty, *with proper care and skill* (page 88, fol. 163), in passing between Troy and Albany with tows as wide as the crooked channels, but difficult in front of Albany with a straight current, to attempt to navigate the tow through spaces as wide and wider than the channels.

There is *not* room *above* the bridge to round to a large
270 steamer (page 89, fol. 371). There is room *below*.

(*Large tows* have room to make up *above* the bridge, but it is said *not* room enough *below*.)

Sail vessels will find it difficult to pass the bridge with a

head wind, when they are *just able* to make their course (page 90, fol. 375).

THOMAS A. TILLINGHAST, of Troy, forwarder, says that making up tows at Albany occupies about *all* the river from Exchange to 1000 feet *above* Columbia street. That is, the whole width, about 900 feet, and one-quarter of a mile up and down. 271

The river is as wide for one and one-half miles below as at Exchange street, and yet there is *not* room enough to make up tows *below*, but *more* room *below* to round the vessels than *above* (page 103, fol. 432).

This witness says that the *large tows* can pass between Troy and Albany whenever they can go from Albany (page 105, fol. 440). 272

He first swears (fol. 442), that vessels would require the draw to be opened every ten minutes, and finally alters it and says once in *five minutes* (page 108, fol. 454).

SILAS BETTS, of West Troy, forwarder, never passed through a draw (page 108, fol. 456); thinks a bridge a great obstruction, and that it would not be safe to navigate a *large steamer* through the bridge, *with a freshet in the night* (page 110, fol. 464); not room enough for a large steamer to round to *above the bridge*, unless one end was fastened (page 111, fol. 464); *not* good anchorage in a *freshet*, for heavy laden vessels (fol. 468). 273

There would be *more or less* danger in dropping a tow through the piers if *the wind was blowing* (fol. 470). 274

A bridge with *two* draws of 200 *feet each* would be a *material* obstruction (page 112, fol. 474).

No difficulty in running a steamer with the current through a well defined space of 110 feet wide in the daytime *if there was no wind* (page 114, fol. 482).

HENRY HAYFORD, steamboat pilot, West Troy, expresses an opinion against the bridge. Has never passed a draw bridge except at Troy *twice* (page 132, fol. 556). 275

NATHAN H. NOYES, of Lansingburg, boatman, has passed draw bridges at Waterford, Troy, on the Schuylkill, and at

Wilmington, and draw bridges are in *most cases* a detri ment to navigation. *according to his experience* (page 138, fol. 580).

276 The detention at the Troy bridge is now *generally slight* (page 142, fol. 602). The bridge is *unfavorably* located. (fol. 605).

Has passed this bridge 400 or 500 times, sometimes detained by *not having the draw opened in time*, and at others by *something aground in the draw. If the draw had been open and clear no detention would have occurred* (page 143, fol. 607).

277 The draw at Wilmington is 30 feet wide. If 20 feet wider with a tug to tow *would have had no difficulty* (page 144, fol. 608).

The draw on the Schuylkill is 50 or 60 feet wide; passed 12 *times* with a fore and aft schooner; had difficulty in but two instances, *and with a tug would have gone through without difficulty* (fols. 610, 611).

278 The opinion of this witness adverse to the bridge at Albany, is based upon *his experience* (page 152, fol. 648).

Would have *no difficulty* in passing such a bridge as is proposed to be built at Albany, under ordinary circumstances (page 152, fol. 649).

Henry Swartwout of Lansingburgh, boatman, has passed bridge at Troy and Waterford (page 159, fol. 681). Would not think it safe or proper to go through the proposed bridge at Albany *with a large tow in a freshet or with a high wind* (page 162, fol. 695).

279 At such a bridge as is proposed at Albany, under ordinary circumstances there would be no detention (page 169, fol. 720).

John N. Miter of Lansingburg, boatman, owner of steam boat John S. Ide, towing between Waterford, Troy and Albany, says the *effect* of a bridge would be *bad*, from danger of *collision* with the bridge and vessels. It would create an *extensive revolution in business*. There would

280

have to be *some other place* for vessels to *anchor and lay in* (page 194, fols. 839, 840, 841).

He would go through the bridge with a tow of barges *in a freshet* if there was nothing in the way *below* (fol. 842). Has towed through the Troy bridge with the steamer 30 times a day (page 195, fol. 844). 281

The bridge at Troy is unfavorably located. The draw can be opened in a minute (page 204, fols. 886, 887).

His idea of draw bridges is predicated upon his experience at the Troy bridge (page 207, fol. 901).

ROBERT ROBINSON of West Troy, forwarder, thinks a bridge at Albany would be a great detention to navigators and a *detriment to all forwarders and real estate owners above it* (page 217, fol. 949). 282

Not easy to pass *with the draw closed in a freshet*, or to round to (fols. 953, 957). Anchorage at Albany not reliable *in a freshet* (page 220, fol. 961).

Has opposed the Troy bridge, the contemplated bridge at Newark and Albany, and has strong prejudices against draw bridges (page 221, fol. 967). 283

If the draw at Newark was as wide as at Albany there would be no difficulty in getting vessels through (page 223, fol. 976).

This witness is of opinion that the ferry boats at Albany, carrying daily about 4,000 passengers, and large amounts of freight *across* the river *have nothing to do with the commerce of Albany, and that the commodities they carry across the river are not as legitimate commerce as those carried up and down the river on other vessels* (page 230, fols. 1009, 1010). 284

Any bars likely to be formed by piers could be dredged so as not to injure navigation (fol. 1025).

LEWIS D. DEMING, West Troy, pilot of the Francis Skiddy, thinks the bridge would be a great obstruction. *Not safe to take the Skiddy down through the bridge in a freshet with a heavy wind across her* (page 246, fol. 1083). Not 285

safe to attempt to pass unless he had the *vessel under control.* He can *round the Skiddy to above Exchange street when there is no wind or current,* but not with both wind
286 and current (page 247, fols. 1086, 1087).

LEVI SMITH of Troy, captain of the Skiddy, thinks *with two draws of* 110 *feet it would be very dangerous to get a large boat through with heavy winds and a high freshet* (page 258, fol. 1138).

A draw of 180 *feet would be of no use,* if vessels had the right to pass through it each way at the same time
287 (fol. 1140).

Would not feel safe in passing the Skiddy, with the wind across, through a draw of 180 *feet if another vessel was in the draw at the same time* (fol. 1141).

Under ordinary circumstances the Skiddy could run safely through spaces not more than 35 or 40 feet wider than herself (page 268, fol. 1182).

288 It requires skill and the utmost care to navigate large vessels between Troy and Albany (page 269, fol. 1186).

JOHN OLIVER of Troy, pilot and owner of the steamer McAllister, has frequently passed the Troy bridge, and can not pass with as much ease as if there was no bridge, *on account of the different stages of the water* (page 277, fol. 1223).

This witness says that a bridge at Albany would be a
289 great obstruction to navigation, "*to build a fence across a highway would of course be an obstruction*" (fol. 1244).

He can't see how collisions could be avoided *if the draw was open all the time* (fol. 1248).

With a draw located in the centre of the river he would not consider himself as safe as in other parts of the river (page 288, fol. 1277).

290 He had rather pass between two vessels aground than two piers of a bridge (fol. 1279).

Can't say whether a barge would lurch 40 feet or not in passing the Troy Bridge in a given case (fol. 1281). (Vide

evidence, pages 291, 292, as to the evasions of witness in respect to given cases of detention at Troy Bridge).

DAVID MANN, Troy, agent of the Troy and Philadelphia barges, says that a bridge at Albany would be "*highly injurious*" to navigation, and that *if one of his propellers with two barges in tow were going down in a freshet, and the draw was closed they would run against the bridge* (page 301, fol. 1336). 291

It would also be "highly injurious" to commercial business above it (fol. 1337).

Yet *the propellers and barges of this line pass through the Delaware and Raritan canal and the numerous bridges over it* (page 303, fol. 1348). 292

He has *navigated* the river as *steward* and *clerk* of the *steamer John Mason* (page 304, fol. 1351).

ISAAC R. GETTY of West Troy, navigator, has passed four times through bridges at Newark and fourteen or fifteen times for three seasons at Troy, and they are a "very great detention" (page 317, fol. 1415). 293

A bridge at Albany "would be a very great obstruction." It would not be safe to take a steamer through in *a freshet and heavy wind blowing across in the night* (page 321, fol. 1435).

All navigators are opposed to bridges (page 322, fol. 1442). 294

His opinion is based upon his experience in passing a draw (fol. 1456).

Saw but one accident to a vessel passing the draw at Troy, and that was the fault of machinery. The draw could not be opened. If it had been opened, no injury would have occurred (fols. 1474, 1475).

At Newark, in a draw of 24 feet wide, had some damage which would not have happened if the draw had been 60 feet wide (fol. 1477). The draw at Troy is the largest he ever saw (fol. 1478). 295

(See pages 330, 331 and 235, as to vessels aground between Troy and Albany, and delays from that cause).

H. W. HAZARD of Troy, forwarder (partner of complainant Silliman), has passed the Troy Bridge a few times, and gives an opinion against bridge at Albany (vide his cross-examination).

296 DAVID H. HITCHCOCK of Albany, captain of the steamer Anna, towing between Troy and Albany, is often *detained three-quarters of an hour by the press and confusion of vessels in Albany harbor* (page 375, fols. 1704, 1705.

Independent of local towing, vessels pass Exchange street *once in thirty minutes* (page 376, fol. 1708).

A bridge would materially injure navigation (fol. 1717),
297 and "*would be dangerous whether there were any vessels there or not*" (fol. 1728).

He would not undertake to go through the draw with a large tow at all, and with a small one *would not have a vessel within* 700 *or* 800 *feet of the bridge either above or below* (page 378, fol. 1719).

No piers can be put in the river at Albany that will not
298 form a sand bar (fol. 1732).

If a vessel should go against a pier *she would surely sink; no spring pile could save her* (fol. 1734).

"Any piers *would be sure* to cause the ice to dam against it" (fol. 1740).

Large steamers could go through the draw in the day time *with a freshet*, but not at night (fol. 1746).

299 If a large Troy steamer was approaching the bridge *in a freshet*, and when *near* it *should be obliged to stop or slow*, and the *wind or current should catch her stern so as to carry it out of shape, she would go foul on the bridge and nothing in the power of man could prevent it* (page 384, fol. 1747).

(Vide cross-examination, as to crowd of vessels at Albany· pages 386, 387).

300 The ferry boats at Albany are often detained (page 389, fol. 1773).

30 *canal*, 6 *steamers*, 8 *barges*, 4 *plugs*, 4 *sail vessels* (*and even a less number*), *fill the river at Albany* (fol. 1775).

So as to detain vessels, while being made up into tows for New York (fol. 1777).

Tows at times are a serious obstruction to navigation (page 390, fol. 1780). 301

(Vide page 391, for reason why tows can not be made up below Exchange street.)

Never passed a draw bridge (page 403, fol. 1845).

E. K. Scovill of West Troy, is of opinion that the erection of a bridge at Albany would be injurious to *the business of floating rafts of timber from Troy to New York* (pages 422, et. seq).

Wm. W. Peters of the state of Iowa, formerly boatman of Troy, is of opinion that a bridge at Albany would ruin navigation above it (page 486, fol. 4054). 302

Alanson D. Agan of Troy, agent of the Troy eastern line, is of opinion that a bridge at Albany *would annihilate commerce at Troy* (page 516, fol. 6005).

Is opposed to a bridge, but does not know what "*hostility*" means (fol. 6008).

The ground of his objection is that the bridge can not pass all the boats doing business above, and at the same time pass rail road trains (page 518, fol. 6012). 303

Can't tell how many vessels there are to pass.

Never saw a bridge without obstructions. *But the only bridges he ever saw are those at Boston* (page 520, fol. 6025).

Don't know how many vessels could pass a bridge at Albany in 24 hours (page 521, fol. 6030). 304

His opinions are *speculative*, partly. Never passed a draw bridge. *Don't know how the bridges at Boston operate. Don't know how long it takes to open and shut them* (page 522, fol. 6034; vide page 523; see answer to question 69, page 526, fol. 6051).

Nelson Bearse, Barnstable, Mass., has passed through draw bridges at Boston, and is of opinion, so far as his experience is concerned, that draw bridges are detrimental (page 531, fol. 6079). 305

A bridge at Albany would be *detrimental.*)*For reasons*, vide answer to question 11, page 533, fols. 2486, 2487).

306 Boston bridges and business above described (pages 534, 535 to 538).

A bridge at Albany built as proposed would be much less obstruction than bridges at Boston (page 538, fol. 2513).

JAMES A. DUNOUT of West Troy, captain of the steamer Saratoga, towing for T. A. Tillinghast & Co.'s line, considers that a bridge at Albany would *annihilate* navigation

307 above it (page 540, fol. 2521).

The most *prominent difficulty* is the insufficient room at Albany, for the accommodation of the business, the dangers of collisions, the difficulty in getting through case of a vessel approaching the draw from below, in time of a *freshet*, &c. (fol. 2522. Vide also pages 560, 561, 564).

Has passed bridges at Troy and Hartford (fol. 2528).

308 This witness is *hostile* to bridges, but *not* to tows, *which block up the river* (fols. 2530–31).

He says blocking up the river with tows "*is navigation, and any captain of a steamer will drop his boats in tow to make room if necessary, and as a general thing we string out our tows in hawsers when we get into narrow places, or where the navigation is dangerous, and make room for other vessels to pass*" (fol. 2531).

309 If in such case he was *detained for hours*, he would consider it but *a temporary obstruction* (fol. 2533).

Does not consider it prudent to take a tow of more than 64 feet wide between Troy and Albany (fol. 2540).

He never saw a vessel pass a draw as wide as the one at Albany (fol. 2570).

Lights at night would be of no advantage in passing a

310 draw (fols. 2580, 2582, 2584).

It would not help the matter if the draw could be *seen three miles off* (fol. 2586).

His opinion as to bridge at Albany is not founded upon his experience but from "the general repugnance of boatmen to pass draw bridges" (fol. 2589).

The ferry boats at Albany crossing the river, are more in the way of vessels than those going up and down (fol. 2615).

311 The foregoing witnesses embrace all who give *opinions* on the part of the complainant, as to the effect of a bridge at Albany. Their evidence is very voluminous, and in most cases to understand the *value* of the opinions given, their whole evidence must be carefully read. The reference to their testimony here is mainly to show in very general terms the *theory* upon which these opinions are uniformly based, to wit, assuming *heavy freshets, high winds,* 312 *a crowd of vessels, and the draw of the bridge closed,* and upon this state of things, predicting *probable* dangers and difficulties in navigation.

It is to be observed also, that the one idea most prominent to the imagination of the greater number of these witnesses, is the apprehended danger to the *local* interests of Troy, which, while it may be highly commendable in them 313 as citizens of the locality supposed to be in danger, does not qualify them to pronounce an impartial and unbiased judgment.

They are most of them active partisans in the bridge controversy, with little or no experience in passing draw bridges, and who regard all commerce which seeks passage *across* the river as *illegitimate*, who insist that the 135 pass- 314 engers that daily struggle over the sand bars between Albany and Troy in the Skiddy and Rip Van Winkle, are entitled to vastly more consideration than the 4000 who pass the ferry at Albany, and who *solemnly swear*, that the delay of a Troy barge or a Philadelphia plug for 5, 10 or 15 minutes at a draw bridge at Albany, will "*annihilate*" the commerce at Troy, although the same vessels, with others, embracing all that are included in the designation of 315 "Troy commerce," lie oftentimes for six or twelve hours on the sand bars, waiting for the tide to float them away without doing essential damage to this commerce of "great variety, expansion and prosperity."

Evidence is given also of the *actual* number of passages at the *Troy bridge*, during the seasons of 1856 and 1857.

316 Complainants' Depositions, pages 430 to 484.

Between April 4th and Dec. 8th, 1856, there were 1392 passages.

Between March 18th and Dec. 19th, 1857, there were 3196 passages. The whole time is 275 days, and the daily average is 12.

317 On the 16th Sept., 1857, there were 44 passages (page 472); July 25th, 27 passages (page 464); July 23d, 31 passages (page 463); July 8th, 34 passages (page 461); June 29th, 25 passages (page 459); May 30th, 30 passages (page 454); May 15th, 31 passages, and May 14th, 35 passages (page 450), and many other days with about the same number.

318 An examination of the statement of passages in detail, will show, that generally the opening of the draw, the passage of the vessel and closing the draw, is performed in about *five* minutes. The detention of the vessel is of course less.

Complainant's Depositions, page 515, fol. 5096.

319 In some instances, depending upon various adverse circumstances, more time is taken — but such occurrences are mostly attributable to the fault of the navigator, unfavorable location of the draw, and the insufficiency of water; and this is shown by the testimony of the bridge tenders, by whom the account was kept. Charles Teson (page 503), and James Sanford (page 510).

During the two years, but few cases of accident occurred, and those were generally not the fault of the bridge, as is shown by the testimony of the two witnesses above referred to.

320 Under ordinary circumstances there is no difficulty in vessels passing through the bridge.

Evidence of Charles Teson, Complainants' Depositions, page 509, fol. 5070.

The ordinary detention to sloops and vessels *dropping through*, is from 5 to 10 minutes. But to steamers and vessels towed through *there is no detention, except in low water.* 321

Evidence of James Sanford, page 511, fol. 5079.

Steam boats, canal boats, barges and sail vessels in tow, well manned and steered, go through this draw without material hinderance or detention.

Evidence of James Sanford, Complainants' Depositions, page 515, fol. 5097.

322

It will be remembered that most of the opinions, *adverse* to the bridge at Albany, profess in a great degree to be founded upon the experience at Troy; and it can be seen by an inspection of every day's record of passages, and the evidence of the bridge tenders, how little foundation the actual experience at the Troy bridge justify the extravagant and extraordinary opinions delivered against the bridge at Albany. 323

As a general rule, vessels propelled by steam, pass without difficulty, or detention, or accident. Accidents and detentions are rare exception, and usually arise from the fault of the navigator; and this is the result at a bridge inconveniently located, on account of the currents and channel, with a single draw opening of only 60 feet.

It is occasionally suggested that this bridge has '*annihilated*" all commerce above it, but there is no evidence to show that one vessel less has gone to Lansingburgh and Waterford in consequence of this bridge. If the docks in Troy *above* the bridge have been vacant since its erection so is the fact as to docks *below* the bridge. 324

Complainants' Depositions, evidence of Getty, pages 315, 316, fols. 1406, 1407, 1408.

325

The population *above* the bridge has *increased* (page 177, fol. 766).

And there is a much more satisfactory reason than the erection of a bridge for the transfer of business below, and

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that is the facilities afforded by docks at West Troy convenient to the canals for the transaction of the lumber business, by means of which the inconvenient docks at and
326 above the bridge, with the currents and sand bars in the channel adjacent thereto are avoided.

It appears also that notwithstanding the sloop lock and the bridge, most of the canal boats from the Champlain canal for Troy enter the river at Waterford and pass both bridge and lock rather than follow the canal to West Troy and enter the river below both

327 There is considerable business between Waterford, Lansingburg and New York, not so much done by *sail vessels* as formerly, as *barges* have taken the place of sail vessels here as elsewhere on the river.

Complainants' Depositions, page 159, fols. 681, 682.

There is no ground for the assumption that the commerce
328 above the bridge is any less than formerly—the only change is in the character of the vessels. If because sail vessels disappear it is to be inferred that the extent of commerce is diminished, then it is clear that the commerce of Troy is gradually being extinguished, for sail vessels to that port are substantially obsolete.

On the part of the defendants there is a great weight of *opinion*, to the proposition that a bridge at Albany con-
329 structed pursuant to the charter, operated with skill, having the facilities for aiding the passage of vessels which the act requires, will not present any material impediment to the navigation of the river. Neither does it rest upon *opinion* merely, but to this is superadded the result of observation and experience by men of large practical and scientific knowledge, who do not testify with the prejudices engendered by participation in an angry and exciting controversy.

330 Of navigators upon the Hudson, well acquainted with its business end navigation, the following witnesses say that

such a bridge as is proposed to be erected, will present no substantial obstruction to the passage of vessels.

331 PHILIP P. STAATS of Greenbush, in the county of Rensselaer (defendant's depositions, pages 160 to 174), who has been engaged for thirty years in every species of vessel, says the impediment of a bridge would be very slight if any.

332 HENRY BEDELL of Greenbush, has for eighteen years been engaged in the navigation of the Hudson at and about Albany, with steam boats, barges, sloops and canal boats and for twelve years as captain and pilot, gives a similar opinion.

Defendant's Depositions, page 174 to 189.

333 WILLIAM I. ENSIGN of Greenbush, pilot of the steamer New World, one of the largest passenger steamers navigating the river, and who has been engaged as pilot *nine* years, is of opinion that a bridge would be no material obstruction, and under ordinary circumstances the bridge could be passed as easily and safely as other places in the river of the same width of channel, and states what is obvious to most men, that under equal circumstances vessels may be navigated through spaces of equal width with the same facility and safety.

Defendant's Depositions, page 191 to 202.

334 WILLIAM H. MATSON of Greenbush, navigator on the Hudson for *twenty-eight* years, in various capacities of mate, pilot and captain of sail vessels and steam boats, says that the proposed bridge would present no substantial impediment or obstruction.

Defendant's Depositions, page 202 to 207.

335 EDMUND ELLIS of Albany, who has navigated the Hudson in all capacities with sloops, steam boats and propellers, through bridges, locks, slips, narrow channels, and between piers, abutments, and vessels aground and afloat, says that

the passage of a bridge could with the exercise of the same care be effected with the same facility and safety as the navigation of other channels of the same width.

336

Defendant's Depositions, page 208 to 214.

HENRY LEWIS of Schodack, in the county of Rensselaer, for *thirty* years engaged in the navigation of the Hudson and other rivers, with sloops, steam boats, &c., is of opinion that a bridge at Albany will not prevent any substantial impediment to navigation.

Defendant's Depositions, page 215 to 221.

337

A minute examination of the evidence above referred to, in detail will show that the opinions expressed are founded upon large experience, and are the result of an intelligent view of all the contingencies of navigation.

They present clearly what to most men is an obvious proposition, that under ordinary circumstances, a vessel, or a tow of vessels, may be safely navigated through the draw

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of a bridge of sufficient width, with the same facility as through any other space of equal extent.

In addition to the evidence of these navigators, there is the testimony of sundry civil engineers of great reputation for scientific knowledge, and of very extensive practical experience (and others of different occupations), who are of opinion that a bridge at Albany is entirely feasible, and

339

can be constructed and operated so as not in any material respect to interfere with navigation; to wit:

WM. J. MCALPINE, of Chicago, civil engineer.

Defendant's Depositions, pages 77 to 103.

ELLWOOD MORRIS, of Philadelphia, civil engineer.

Defendant's Depositions, pages 357 to 382.

340

EDWIN F. JOHNSON, of Middletown, Conn., civil engineer.

Defendant's Depositions, pages 382 to 411.

CHARLES L. MCALPINE, of Chicago, civil engineer.

Defendant's Depositions, pages 115 to 118.

BENJ. B. BRAYTON, of Davenport, Iowa, civil engineer.

Defendant's Depositions, pages 135 to 141.

JOHN E. HENRY, of Davenport, Iowa, civil engineer. 341

Defendant's Depositions, pages 141 to 144.

ROSWELL B. MASON, of Dubuque, Iowa, civil engineer and contractor.

Defendant's Depositions, pages 144 to 155.

WARREN COLBURN, of Toledo, Ohio, civil engineer.

Defendant's Depositions, pages 299 to 305.

DANIEL L. HARRIS, of Springfield, Mass., civil engineer. 342

Defendant's Depositions, pages 305 to 314.

ALEXANDER H. SHULTZ, of Fishkill, Dutchess county, steam boat proprietor, navigator, harbor master of New York, &c.

Defendant's Depositions, pages 314 to 320.

LAWRENCE DEARSTYNE, of Greenbush, Rensselaer county, ferry pilot at Albany. 343

Defendant's Depositions, pages 320 to 334.

THOMAS L. GREEN, of Albany, rail road agent.

Defendant's Depositions, pages 334 to 350.

SMITH BRIGGS, of Albany, rail road agent.

Defendant's Depositions, pages 350 to 357.

ANDROS B. STONE, of Chicago, bridge builder. 344

Defendant's Depositions, pages 45 to 58.

HIRAM WHEELER, boatman, New York.

Defendant's Depositions, pages 230 to 241.

HENRY WILSON of Philadelphia, captain of a propeller.

Defendant's Depositions, pages 241 to 254.

WILLIAM LYONS, of New York, pilot at Sandy Hook and New York Harbor. 345

Defendant's Depositions, pages 254 to 273.

WM. R. GIBSON, of Williamsburgh, ferry pilot.

Defendant's Depositions, pages 274 to 282.

EDWARD HOPE, of Williamsburgh, New York harbor pilot.

Defendant's Depositions, pages 282 to 295.

346 If this case was to be determined on the fact, by the weight of opinion merely, it is submitted that it is clearly with the defendant. On the part of the complainant, but one class of men testify, and they are taken mainly from Troy, from the most prejudiced and excited opponents of a bridge at Albany.

347 On the part of the defendant, men of different professions and occupations; of scientific knowledge, practical experience, and extensive observation of the operation and effect of draw bridges — give evidence. They are not connected in feeling or interest with the bridge controversy. If it can be properly said that any of them have *prejudices* in favor of draw bridges, it is certainly not the navigators upon whose testimony we rely. If those who are civil engineers and connected with rail road enterprises, can be 348 said to have contracted views favorable to the bridging of navigable streams for rail road purposes, it is certain that no particular connection with this controversy is calculated to bias their judgment. Their views and opinions are the result of scientific knowledge, combined with actual experience, which enables them to speak with intelligence and confidence.

349 But the *fact* that a bridge at Albany, may be so constructed and operated, as not to present any material obstruction to navigation, does not rest upon opinions merely.

As to what may be judicially regarded a *material* and what an *immaterial* obstruction or impediment, opinions may differ, and the precise line of division may not be clearly 350 defined. It has, however, been judicially determined, that a dam with a lock, or a bridge with a convenient draw through which vessels may pass, is not an *obstruction* to navigation.

To detain vessels for a few minutes at a draw or lock, is

not a *material* obstruction in any sense—judicial, legislative or commercial.

A detention or delay to vessels, which will not seriously affect the *business* of navigation, or any business which depends upon it, can not be material, and whether a given delay of vessels will seriously affect business, may in some measure depend upon the manner in which it is conducted; and the question how far its successful prosecution depends upon the exact and accurate movement of vessels, and in respect to this question, so far as it is involved in the present case, the following suggestions are submitted: 351

First.—That the business of the Hudson river, at and above Albany, does not depend upon any accuracy or precision in the movement of vessels, is entirely apparent. Temporary delays and occasional disaster, are incident to all water navigation. The wind and the tide affect it more or less, according to circumstances, in respect to which no certain calculations can be made. 352

The business of the river above Albany, is conducted with constant reference to these exigencies. Delays of greater or less duration, are of common—even of daily occurrences. 353

To achieve the passage of sand bars, passenger steamers and tows wait for hours for the rising of the tide. They frequently run aground above and below Albany, and remains so for six and twelve hours, until the return of high water enables them to pass on. This is not occasional but frequent for some seasons of the year. In high freshets, navigation is dangerous and impracticable, and vessels lie at their docks until the water subsides. 354

Yet with all these delays, it is said, the commerce of Troy has prospered, and if so, delays of vessels for hours at the docks or at sand bars, do not "*annihilate*" nor *materially* injure it. Can it be said, that a delay, of five, ten, thirty or even sixty minutes, at Albany, for passing a bridge (if any such occurrence was likely to be common), will 355

more *materially* injure its commerce, than the same or much greater and more frequent delays on sand bars.

356 *Second.*—The location of the bridge at Albany, is vastly more favorable to its successful operation than the bridges at Troy, Rock Island, Chicago and various other places.

The channel of the river is wide, the current direct and uniform, and in ordinary water is very inconsiderable, and not in the highest freshets as rapid as the current at Rock Island in ordinary water. Proper piers will not create sand bars, and if created may be removed by dredging.

357 *Third.*—The width of draws, if only one 180 feet, if two as is more probable, 110 feet each in the clear, afford ample space for the widest vessels to pass. The draw of 110 feet is 40 or 50 feet wider than the widest vessel passing above; and from 60 to 90 feet wider than the ordinary vessels passing. Two such openings are presented, and at one opening, if there happen to be vessels passing each 358 way, one or more may pass up through one draw, and a like number pass down through the other, without difficulty, delay or danger, under ordinary circumstances.

The draw of 110 feet is wider than the ordinary tows which are or can be safely navigated between Troy and Albany, and they may ordinarily pass with ease and facility. If at times the tows are wider than the draw (and such 359 an event, if ever, must be exceedingly rare), the tow on approaching the bridge may be diminished with the same safety and facility that they are diminished when approaching narrow channels in the river, vessels aground, or other obstacles, which is of freequent occurrence, and unattended with difficulty. These tows being (in number of vessels) mainly composed of canal boats, which are usually placed 360 on the extreme outside, are easily cast off, or dropped behind (diminishing the width and increasing the length of the tow), and being easily managed, may be conducted under the bridge, or made fast to a dock as will best suit the exigencies of the occasion. These boats are also easily managed by the use of the ordinary setting pole, with which

all canal boats are provided, and by means of which canal boats which enter the river from the Champlain canal at Waterford, are propelled on and across the river to the sloop lock in the State dam above Troy. 361

In respect to the larger tows for New York now made up at Albany, above the site of the bridge, the evidence is clear, that at times the manner of making them up and the space occupied for that purpose, tends to the obstruction and delay of other vessels. At such times these large tows are a nuisance in the river, and there is room to make them up below the bridge, or they may be partially made up above the bridge, pass through and additional vessels added, as the smaller tows arrive from Troy. 362

In times of high freshets or heavy winds, some difficulties may be experienced, but no greater than now happen, and as a general rule, at such times, navigation is practically suspended.

Fourth.— Properly constructed piers are not likely to tend to the creation of sand bars. Such is the opinion of Messrs. McAlpine, Morris and Johnson, engineers, competent from knowledge and experience to give a reliable opinion. By the construction of piers, the current will not be increased to any such extent, as will be likely to disturb the bottom of the river. The water way will not be contracted, for it is proposed and intended to enlarge it. 363

Vide evidence of Morris, Defendant's Depositions, pages 359, 360. 364

Besides, it is clear that the provision in the charter, that the company shall cause any sand bars, which may form, to be removed by dredging, affords all the guarantee which can be reasonably desired. All the witnesses agree, that this condition being duly performed, will remove any objection on this account, and it is obvious that there is no more difficulty in removing sand bars at the bridge, than above, where navigation is mainly dependent upon the use of the dredging machine. 365

The formation of ice dams, by reason of the piers, is another difficulty suggested; but practical experience does not
366 justify the apprehension of any such danger. No ice dams have ever formed by reason of the piers of the Troy bridge. Properly constructed piers operate as ice breakers, rather than facilitate the formation of ice dams. Ice dams usually form in shallow water, and then they disturb the channel. If they form in deep water, the channel is not disturbed. The water passes under the ice, and creates little or no dis-
367 turbance of the bottom below.

Delafield's report, Complainants' Depositions, page 658, fol. 3189.

Fifth.—It is shown beyond reasonable cavil, that the commerce at and above Albany, requiring the opening of a draw for its passage, can be accommodated by a bridge without difficulty and delay. There is nothing in the nature
368 of a draw bridge at Albany, which will render its management more inconvenient than at other places. It may be opened and closed in from one to two minutes. The space afforded for the passage of vessels, when the draw is open, is ample. The current is direct and uniform; the water deep, and navigation easy. With steam tugs to tow sail vessels through, it is inconceivable, that under ordinary circumstances, any substantial delay will occur. When we undertake to imagine extraordinary circumstances, in the
369 state of the river, as to freshets, winds or press of vessels at the bridge, we must also assume in the same connection, that navigation at such times will be either practically suspended, or that those who attempt to prosecute it will resort to extraordinary effort, to conduct it with success and safety, in view of all the extraordinary dangers or difficulties to be encountered.

The fact that at Chicago 150 vessels, and at Gray's
370 Ferry, on the Schuylkill, 180 vessels, may and have passed these draws without difficulty or delay in a single day, and that at Chicago 100 pass daily on the average, during the

season, is better evidence of what number of vessels may, under more favorable circumstances be passed at Albany, than the opinion of a legion of witnesses of no experience at draw bridges. The bridge at Albany, in respect to favorable location, width of channel, rates of current, capacity of draw, the aid of steam tugs, will, according to all reasonable calculation, afford greater facilities for the passage of vessels, without inconvenience, danger or delay, than any draw bridge known to navigators, engineers or commercial men. 371

The number of vessels requiring passage of a draw will not ordinarily much exceed one-half the average passages at Chicago. Upon the most extreme claim made on behalf of the complainants, the number of passages will not exceed the daily average at Chicago. 372

There can be no reason to doubt but that every vessel on the river may be accommodated if the draw is kept open half the time. 373

Every rail road train probably requiring passage can be passed with the draw closed less than one-quarter of the time.

Sixth.—The fact that sail vessels are substantially extinct; that barges decrease, and canal boats are increasing, presents a case where the traffic upon the river and across it may both be accommodated without substantial injury to either. 374

SIXTH—Facts appearing in the case as to the effect of draw bridges upon commerce and business above, &c., &c.

There is nothing in this case showing that a properly constructed draw bridge, capable of being opened with reasonable facility, necessarily inflicts serious injury upon commerce and property above. 375

At Chicago, population, business and the value of property have continued to increase above its bridges.

Wm. A. Burton (complainants' depositions, pages 49 50, 52, fol. 215) says that property has increased in value
376 above the bridges with the increase of bridges.

J. W. Hibbard (complainants' depositions, page 56, fols. 230, 232) says that the shipping at Chicago has increased more than 200 per cent. in five years.

At Gray's Ferry over the Schuylkill, a very large and extensive business has grown up above the bridge since its erection.

Defendant's Depositions, pages 242, 243, 376 and 377.

377 *At Boston, on the Charles river*, although several draw bridges of inferior construction span the river, the towns above are improving in growth and manufactures, and have been for the last 8 or 10 years.

Complainants' Depositions, pages 535, fol. 2499.

There is nothing to show that the *bridge at Troy* has
378 caused one less vessel to visit Lansingburgh and Waterford, or that its commerce is now less than when the bridge was built.

Defendant's Depositions, pages 393, 403.

It is clear that the commerce above was never very great, from the nature of the river at and above the bridge as far as Waterford.

379 Population has increased at Troy, above the bridge.

Defendant's Dep., page 177, fol. 766.

Complainants' Depositions, pages 412–13, fol. 1891.

Green Island, *above* the bridge has, since its erection, largely increased in population and business.

Defendant's Depositions, pages 178, 413.

380 If since the erection of the bridge at Troy, the value of property above, or business upon the docks has increased or changed its location, it can be ascribed to other causes than the erection of the bridge, and the principal cause is,

the side cuts of the canal at West Troy, and the facilities there afforded for the convenient transaction of business.

Complainant's Dep. (Ev. of N. H. Noyes), pages 152, 157, 381
" " (Ev. of H. Swarthout), page, 169 to 174, and 176 to 178.
" " (Ev. of R. Robinson), page 226.
" " (Ev. of Isaac R. Getty), pages 316, 325 to 328.
" " (Ev. of Charles Brownell), page 413.

Since the erection of the bridge at Troy, docks *below* have been unoccupied for business purposes as well as docks *above*. 382

There is considerable business above, but not so much by sail vessels, as barges have taken their place.

Complainants' Depositions, page 159.

Whether the general result of business above is more or less since, than before the bridge was erected, does not appear. 383

And it must necessarily be, that whether a draw bridge will or will not injuriously affect navigation and business and property above, must depend upon the character of the business, and the character of the bridge. If a bridge affords reasonable facilities for the passage or vessels, there is no reason why business above should suffer.

384

SEVENTH—Facts respecting the action of the government of the United States, touching the Hudson river at and above Albany.

Troy has been made a port of delivery, by act of Congress.

Appropriations for the improvement of navigation of the Hudson have been made by Congress. 395

In 1834,	$20,000.
" 1836,	100,000.
" 1837,	100,000.

In 1838,------ ------ ------ ------ $100,000.
" 1852,------ ------ ------ ------ 50,000.

See Complainants' Depositions, pages 568, 569.

386 Efforts have been made from an early period, to improve the navigation of the Hudson, both by the state and national governments. As early as 1797, the Legislature of New York made appropriated for the improvement of the river, and up to 1818 had appropriated and expended $148,707.94.

Complainants' Depositions, page 628.

387 Various other proceedings were had by the state from 1818 to 1831, respecting the improvement of the river and various amounts of money expended. In 1831 the attention of Congress was called to the subject (page 637).

388 The first appropriation was made by Congress in 1834, and continued for various years until 1839, when operations were "suspended in consequence of a change of policy in the national councils on the subject of internal improvement" (fol. 3096).

"After the abandonment of the works by the general government in 1839" (fol. 3099), the citizens of Albany expended $1,500 in 1840, on the Castleton bar.

389 In 1845 $4,000 was expended by Albany and Troy.

In 1852 the Legislature of New York appropriated $10,000 for the removal of the Castleton bar, and the work proceeded under the direction of Mr. McAlpine, State Engineer (page 642).

390 In 1852, Congress appropriated $50,000, and Major Delafield made a report upon the manner in which it should be expended, which did not meet the approval of the department, and nothing further has been done by the general government.

The U. S. arsenal is situate 5 miles above Albany, on the west bank of the river, the works for which were commenced in 1816, and have been increased, until the whole expenditure amounts to $520,000 (page 492).

EIGHTH—Claims made respecting the Manufacturing Business of Troy, &c.

391 There is evidence given to show the extent of manufactures in the city of Troy and vicinity, and it is in form of an estimate by Charles Brownell.

Complainants' Depositions, pages 408 to 421.

It is not perceived what particular pertinency it has to the questions involved, unless it is used to magnify the amount of Troy commerce; but it does not appear to employ any other vessels than those spoken of by Mr. Hazard. 392

This statement is also very much inflated, as will appear on examination. Various firms with a large amount of business at West Troy and Green Island, in the county of Albany, are appropriated to swell the amount of manufacturing business of *Troy* (see pages 419 to 421).

Of 9,147 persons claimed to be employed in manufacturing business (fol. 1918), 4,140 are employed in making shirts and collars (fol. 1855). 393

Not one item in the statement presented, *is known to be true* by Mr. Brownell who prepared it and by whom it is verified (page 410, fol. 1954).

It appears that at Chicago, in consequence of the great number of persons requiring passage *across* the river, no *ferry boat* could accommodate them (at some points) without serious injury to the navigation up and down the river (complainants' depositions, pages 20, 21, fols. 79, 80), and that at these points draw bridges are a less obstruction than a ferry would be. 394

At Albany, the passage of ferry boats is often impeded by vessels going up down, and sometimes ferry boats interfere and impede the progress of such vessels.

These facts suggest this question: In a case where the passages over a navigable river, by means of a ferry, are so numerous and extensive as to seriously impede and interrupt vessels navigating up and down the river, under a coasting license, whether the right of passage over by state 395

license, is subservient to the right of passage up and down, which is given to vessels sailing under a coasting license.

396 If a ferry may be maintained by state authority, which seriously impedes navigation up and down, is a bridge erected as a substitute under state authority, which presents less obstruction to navigation than the ferry, legal and proper?

On the part of the defendant it is claimed, that the following propositions of fact, are clearly established, to wit:

397 *First*—That the state of the currents, width of channel, character of the bed of the river, at Albany, affords peculiar facilities for the location of a draw bridge, through which vessels navigating the river may pass with reasonable facility.

That the erection of the piers necessary to support the bridge, will not tend to the creation of sand bars or ice

398 dams, which will interfere with navigation.

See preceding statement, pages 14, 15, 16.

That above Albany the channel of the river, through which all the commerce has to pass, is narrow and devious and in some places, at low water, is not to exceed 100 feet, wide, and vessels ground frequently in attempting to pass.

399 That in view of this imperfection, large vessels and tows, from Troy and West Troy, are obliged to start with reference to the state of the tide, to enable them to get over the sand bars.

And that substantially there is no natural navigation in the river between Troy and Albany, and the same is kept open by means of the almost constant use of a dredging machine, operated under command of Capt. Smalley, and

400 owned by the corporation of Troy.

See statement, pages 16, 17, 18, 19, 20, 21.

Second.—That as a general rule, a small class of vessels navigate the river between Troy and Albany. Few sail

vessels venture above. The business is principally done in canal boats and barges, towed by small steamers. Sail vessels are substantially obselete. Barges are decreasing and canal boats are increasing. Much the largest number of 401
vessels on the river at and above Albany, are canal boats, which, with a large share of barges without masts, and many of the steamers, may pass under a bridge elevated 20 feet above ordinary water without inconvenience, without the opening of a draw.

See statement, pages 21 to 24.

That the commerce of Troy is not as great by one-half 402
as the amount claimed for it, and may easily be accommodated by a proper draw bridge.

Statement, pages 24, 25, 26, 27.

And that but for the business which the canals furnish, by means of the side cuts at West Troy, the commerce of the river above Albany would be very inconsiderable.

Statement, pages 28, 29. 403

That the number and kind of vessels which have occasion to pass the bridge at Albany, may be accommodated without difficulty at the draws with the facilities provided for in the charter of the Bridge Company. The daily average of draw openings required, will fall considerably below 100, and will not ordinarily exceed half that amount.

Statement, pages 31 to 40. 404

That the smaller tows of vessels from Troy may pass through the draws of the bridge, and there is room and convenience for making up the large New York tows below, and by changing the location the harbor of Albany will be relieved from the nuisance to navigation which the making up of the large tows create.

That tows wider than the draw of the bridge may be 405
diminished in width by detaching vessels so as to pass the draw without difficulty, and this practice is constantly re-

sorted to now in approaching narrow channels, or vessels aground in the river (page 39).

406 That under no circumstances is it probable that the draw of the bridge will require as many daily openings to accommodate the commerce as are easily accomplished at other draw bridges of less favorable construction than the proposed bridge as Albany.

Statement, pages 31 to 40.

407 That the steamers and barges now navigating the river at and above Albany may in most instances, with very little difficulty and at small expense, have their upper works so modified that they can pass under the bridge without any opening of the draw, and the space afforded for passage is full as wide and wider than the spaces through which they are obliged to pass between Troy and Albany, and the navigation much more safe and convenient (page 40).

408 *Third.*—That a very large trade and travel pass the river by means of a ferry with inconvenience and expense. That delays and dangers are frequent. That the ferry is not equal to the business now and that it is constantly increasing, and that for the better accommodation of this trade and travel the public interest requires a bridge, even if by it vessels are in some instances temporarily delayed and the business upon the river in some small degree incommoded.

409

Statement, pages 41 to 47.

Fourth.—That actual experience with draw bridges at various points in the United States, as to their effect upon commerce and navigation — the facility afforded for the passage of vessels of all classes, and the trifling inconvenience to vesssels in making the passage — the number actually passed daily furnishes clear and conclusive evidence that the bridge at Albany, operated with skill, having the aid of

410

steam tugs, will present no material obstruction to navigation.

Statement, pages 48, 49, to 54.

411

That the opinions given, adverse to the feasibility of a bridge at Albany, are the conclusions of prejudice and inexperience, and are in conflict with undisputed facts and common experience. They are also given with reference to a state of the river, which is of uncommon and extraordinary occurrence, and not based upon the ordinary condition of navigation.

412

Statement, pages 55 to 64.

That the opinions of disinterested and experienced navigators, of engineers and men of practical knowledge of navigation — as well as undisputed facts, prove, that a bridge at Albany, may be so constructed and operated under the charter, as that the rail road business and traffic across, may have reasonable accommodation, and the navigation of the river not impeded in any essential or material degree.

413

Statement, pages 65 to 72, et seq.

Fifth.—That draw bridges of proper construction, do not ordinary inflict injury upon commerce and property above. At Chicago, Boston, Gray's Ferry and Troy, business and population increase above the draw bridges, although affording a narrow space for passing vessels, and having no aid from steamers in the passage.

414

Statement, pages 76, 77.

Sixth.—The government of the United States has done nothing with the Hudson river at or above Albany, to exclude the jurisdiction of the state over it. All the attempts by the United States to improve navigation, were abandoned in 1839, and have not been resumed. Since then, all actual effort to improve or preserve the navigation has been made by state authority or by private persons.

415

Seventh.—Upon the whole case, it is apparent, that a strong necessity for a bridge at Albany exists, for public
416 convenience. That it may be constructed without particular injury to any local interest or business, dependent upon river navigation. That the Hudson is exclusively a New York river. That the whole question as to power and policy is exclusively within the jurisdiction of the Legislature of the state of New York, and that the authority was discreetly exercised in authorizing a bridge at Albany, for the con-
417 venience of internal travel and traffic, which shall not present any substantial obstruction to the commerce of the river.

JOHN H. REYNOLDS,
Of Counsel for the Defendant.

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THE SOVEREIGNTY OF THE STATES OVER THEIR NAVIGABLE WATERS.

ARGUMENT

OF

DANIEL D. BARNARD,

IN THE

ALBANY BRIDGE CASE,

SUBMITTED TO THE

Supreme Court of the United States,

AT THE TERM HELD IN THE

CITY OF WASHINGTON,

IN ~~FEBRUARY~~ Dec, 1860.

ALBANY:
ATLAS & ARGUS PRINT.
1860.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN EQUITY.

ROBERT D. SILLIMAN,
vs.
THE HUDSON RIVER BRIDGE CO.

FREDERICK W. COLEMAN,
vs.
THE SAME.

ARGUMENT OF D. D. BARNARD FOR DEFENDANT.

I.

This case comes before the Court in a way to involve questions of a good deal of magnitude and interest; one of which, at least, and that the highest of all in importance, has never, so far as I know, received the deliberate consideration of this Court.

The particular question referred to, has relation to the extent to which the authority of Congress, under the power "to regulate commerce," may be carried in asserting a supremacy of sovereignty and jurisdiction in the Govern-

ment of the United States, both on the waters and on the land, within the territorial limits of the several States, over the sovereignty and jurisdiction of the States. To that question I shall ask leave to call the special attention of the Court before concluding my argument.

This case arises from the action of the Legislature of the State of New York—the supreme power in the State—taken to establish a bridge across the Hudson River at Albany. The Act for this object was passed in 1856, and a supplementary Act in 1857. The State proceeds by a mode usual in the States in prosecuting their works of public improvement—by incorporating a Company with authority to erect a bridge, under the special limitations and instructions of the Act of Incorporation.

The State of New York, as everybody knows, beginning early, has accomplished a good deal in the way of public improvements. Having the Bay of New York, with the commercial emporium of the country seated upon its shores, and having the Hudson River ascending from it, and navigable for vessels and steamers of large size for 150 miles—a great highway of commerce—she early adopted, and has executed, plans by which she has extended this water highway, by a grand system of artificial rivers, through her entire territory, north and west; and has thus brought her great river and bay, opening to the sea, and her great commercial city, through a thoroughfare of navigable waters, into a direct commercial connection with a foreign country of vast extent on her northern boundary, and a chain and system of States of the Union, actual and prospective, in the boundless West—where still "the star of empire" seems to take its way.

Already the connected commerce on these navigable waters of the State, natural and artificial, is immense. With the completion of the enlargement of the canals, it cannot fail to be greatly increased. As a valuable portion of that which passes on the Hudson, in connection with the

canals, employs the river above Albany, it is the highest interest of the State to take care that the navigation of the river at and above Albany, as well as below, shall be preserved.

But the State has highways of commerce on the land as well as on the water. Besides its common roads and turnpikes, it has an immense system of railways, stretching through the State by various routes, constructed at vast cost, and bearing vast amounts of commerce and travel. The great central line of this system of railways connects New York with Buffalo, and the almost limitless West, and crosses the river at Albany. Other lines, one coming westward from Boston, and another coming southward from Canada, and the States north and east, also cross the river at Albany.

Ferries have been established at Albany from the earliest time, and always maintained under colonial and State authority. At the present time, besides two steam ferry-boats for common use, and kept in almost constant motion, there are two others which have thus far served, very imperfectly of course, to supply the broken link in the otherwise continuous lines of railway just referred to. Nearly 4,000 passengers cross the river daily in connection with these railways—a good deal more than a million a year, and more than 500,000 tons of freight. Ferry-boats afford very inadequate and inconvenient means for a business of such magnitude.

The State finally concluded, in 1856, that the time had come—the population of the State having run up to a sum greater than that of the whole Union at the Revolution, and the movement of property and persons on her highways of commerce, being much greater than in ordinary proportion to the population—when better facilities ought to be afforded, and were, in her judgment, imperatively demanded, for so much of this movement of property and persons as must traverse the Hudson at Albany.

She determined, therefore, to establish a bridge at this point. She believed that a bridge could be so constructed that while it would afford increased facilities for the traverse of the river, it would still leave the navigation of the river free for all useful purposes, with no other inconveniences than such partial ones as must always arise, to some extent, in works of this character, and which, by the very necessities of the law of general improvement and progress, must be submitted to, in consideration of the just accommodation required to be afforded to other public interests, quite as important as those to which such partial inconveniences may apply, and equally entitled to the fostering care and protection of the government.

The State was the proper guardian of both interests, and of all interests affected by the measure, certainly to the extent to which the domestic commerce and travel of the State were concerned. It acted for both interests; and for both interests in that ampler view which embraces so much of the foreign commerce of the country, and of the commerce between the States, as moves upon, or traverses the river at this point, and in the protection and preservation of which the State of New York has a deeper stake, certainly than any other State, and than a good many States combined.

It is not an unimportant consideration in this connection, that the immense interests involved in the Postal and Military systems of the United States, coming within the State of New York, do naturally, and must of moral necessity, seek and employ the same channels of communication, and the same means and facilities, artificial as well as natural, for traversing the State, as the commerce of the State employs.

I think it may be said, without fear of gain-saying, that if the Government of the United States had undertaken to make post-roads and military roads for itself in the State of New York, and if it had gone further, and undertaken a

grand system of internal improvements in this State by making roads, canals and railways, for promoting and facilitating that foreign commerce, and commerce between the States, which it is its province to "regulate," it could not have devised a system of improvements more perfectly fitted to all such national uses, than that which has been prepared by the State alone, under its original and undoubted power to make roads, canals, railways and bridges, not in conflict with the Constitution of the United States or any law of Congress, for the benefit of the domestic interests of the State, and of the commerce belonging to or passing through it.

The State has believed that its system of public improvements was very incomplete without the addition of a bridge at Albany. And if the State had not embarked in this enterprise, and if the Government of the United States was competent to undertake it, and could have done so with propriety under any power it possesses, I think Congress could scarcely have done anything, on the same scale, of greater usefulness, or of more pressing importance, for the national objects under its charge within the State of New York—for its post system and mails, for military uses, and for whatever might facilitate foreign and inter-State commerce in this quarter of the Union—than itself to construct just such a bridge at Albany as the State now proposes to establish.

This Court will not presume, nor be lightly convinced, that the State has entered on this enterprise without due consideration of all the interests that may be affected by it. Nor will it assume, or be easily persuaded, that it is itself a better judge than the State can be, however enlightened by any testimony which interested parties may bring before it, of the various questions, physical and economical, involved in it. These same parties, be it remembered, and all parties opposed to the measure, as well as those in its favor, have been heard, with whatever testimony they chose

to offer, before appropriate committees of the Legislature, before the enterprise was adopted.

Now the Court has the authoritative and formal announcement in the Acts of the Legislature of New York authorizing the bridge, and which I know it will take pleasure in treating with all respect, that the State believes that a necessity had arisen for a bridge over the Hudson at Albany; that the time had come when it was its duty to provide for the transit over the river, by that means, of the great and growing press of commerce and travel seeking passage at that point; and that a bridge could be constructed under the directions, limitations and provisions of the Act of the Legislature, which would not obstruct, or materially impede or injure the accustomed use of the river for navigation at and above the bridge, or occasion any material loss or damage to individual property, or to the business interests of any locality or community whatever.

Can this Court, under any conceivable circumstances, be a better judge of these grave matters than the State, to which they would seem more appropriately to belong? Is it a proper exercise of judicial power in this Court—is it the exercise of a judicial power at all—for this Court to sit as a Council of Revision over the Acts of a State Legislature on such questions as these — questions fit only for legislative investigation and decision; when the only ground on which the Court can be asked to entertain them in the present stage of the business is, that at the end of its investigations, and its examination of 5,650 legal folios — more than one thousand octavo pages of closely printed matter— in the form of evidence, almost wholly speculative in character, it might reach a conclusion different from that at which the State had arrived in regard to the necessity, the general propriety, and the safety to the public interests, of a bridge at Albany.

This case first came to a hearing before his Honor Mr. Justice Nelson, in the autumn of 1856, upon a motion for

a Preliminary Injunction. On this motion, in July 1857, the State was laid under a Judicial Interdict in regard to the establishing of a bridge, as authorized and provided for in the Act of the Legislature, and has so remained now for two years and a half.

And this Interdict was laid, not because the Court had come to a conclusion, upon the proofs then before it, adverse to the right of the State to construct such a bridge as was proposed; not because the Court was of opinion that the State had misjudged in its estimate of the effect to be produceed by the bridge upon the navigation of the river; not because the Court was of opinion that the State had passed a law for this object which was in conflict with the Constitution, or any law of Congress; not because the party complaining had made out any case whatever against the sovereign right of the State in the premises; but because the Court, at some future day, and on further proofs, might be brought to conclude that the State had so far erred on the purely speculative question of the effect to be produced on the navigation, as that a conflict between the State law and some law of Congress might arise, or manifest itself, if the bridge should be established.

The mischiefs of this early, and, as it will be my duty to insist in this argument, entirely premature interposition of the Court in a case of this sort, are apparent in this very proceeding.

His honor, Mr. Justice Nelson, for whom I beg to say I entertain the highest respect, in the opinion delivered by him, on granting the Preliminary Injunction, declared that, "in his judgment, the real and turning point in the case is, whether, or not, * * * the draw or draws will furnish reasonable means to prevent any substantial obstruction to the navigation." On this question, which, in the hands of the Court, must be one of pure speculation, the Court doubts, and upon this doubt the State is laid under interdict, and yet, all the while, it was an admitted fact in

the case, that for three or more months in the year—always the most difficult and dangerous for the passage across the river—the navigation of the river is wholly closed by ice, during which the use of the bridge would be exceedingly important to the great interests intended to be secured by it, even if not allowed to use it at all for the rest of the year, and when, of course, no possible question of obstruction by the closing of the draw or draws, could arise.

I shall endeavor, by and by, to satisfy this Court that in any case where a question of conflict is made between a law of a State passed under an admitted power, and a law of Congress passed under another and a different power, and where no question of conflict arises on the face, or by the terms of the State law, it is quite time enough for the jurisdiction of the Courts of the United States to be brought to bear upon the case, when some actual conflict or collision takes place by some act, or the exercise of some authority, under the State law, of such a character as may authorize and lead the Court to pronounce that the two laws cannot stand together, and each have a reasonable and fair execution and operation, but that one must give way. That of course must be the State law, since the Act of Congress must have the supremacy which the Constitution assigns to it.

This case having been again heard, upon further proofs, before the Circuit Court, and the two judges sitting at that Circuit having divided in opinion, the case comes before this Court for final adjudication.

II.

The case before the Court is this:

An Act had been passed by the Legislature of New York, authorising the erection of a bridge over the Hudson River at Albany.

Before anything was done towards the actual erection of the bridge, this suit was brought.

The parties complaining are: first, a citizen of Troy, and next, a citizen of Massachusetts.

Both claim rights to the free navigation of the Hudson River, under a license from the authorities of the United States, for the coasting trade.

The suit in form, is against a Chartered Company, which is authorized to construct the bridge. In substance and effect, it is against the State of New York. It is the State that has undertaken to establish a Bridge over the Hudson at Albany, for the public benefit, and as a part of its system of public improvements. It has proposed to do this through the very usual and accustomed agency of an Incorporated Company.

The matter complained of in the case, is a public law of the State, authorising the erection of a bridge, when, according to the complainants, no such bridge can be erected without violating rights secured to them by a paramount law of Congress.

It is thus that the complainants make a judicial case for themselves before the Court. They claim personal rights under an Act of Congress—the Act passed for granting licenses to vessels for the coasting trade. Having possessed themselves of such a license, for vessels owned by them respectively, and being accustomed to pursue the coasting trade, under that license, on the Hudson River, as far as Troy, where a port of delivery is established by law, they claim the right of free navigation to that point, and they complain that the law of the State authorising a bridge at Albany, will, if carried into execution, result in obstructing that free navigation, to their personal injury.

But the complainants in their Bills, set forth other grievances besides their own, and they arraign the State of New York before this Court, upon grave charges of error, and of faults worse than error, in the measure under con-

sideration. They declare that the enterprise has been entered upon without any public necessity for it; that the public interests are well enough, and fully, subserved by existing facilities, without this bridge; that the State by this measure is sacrificing, or greatly injuring its own vast property and interests in the Erie and Champlain Canals; that individual property, real and personal, will be greatly and irretrievably impaired by it; and that the great manufacturing and other business interests, and property of the city of Troy, with its population of 40,000, and of the neighboring villages of West Troy and Green Island, with their population of 7,000 more, are about to receive great and irremediable injury at the hands of the State by this measure.

This rather serious arraignment of the State of New York before this Court, first by a citizen of Troy, and next by a citizen of Barnstable, in Massachusetts, discloses clearly enough who the real party in interest is, in this suit. The city of Troy does in this matter what she deems it for her interest to do, and nobody blames her for it. If she is more frightened than harmed, that is not an uncommon case. But, at least, we must not turn away our eyes from seeing that it is not so much the great public interests involved in the free navigation of the Hudson River which are represented by the nominal parties to this suit—in connection of course with the personal stake they have in the matter—as it is the alarms, if these are really felt, or the commendable aspirations and ambition of a particular community within the State of New York, numbering 40,000 out of the 3,500,000 of population, which the State has under its care and protection—a community which happens to have fixed the site of its beautiful domain a little too high up the river to catch all the advantages of commercial prosperity, and a little above the point where the State has thought that the public interests at large demanded that a bridge should be established.

Now I must take leave to say that the economical policy of the State in prosecuting this work of public improvement, and the effect that may be produced incidentally upon individual property, real or personal, or upon the general business interests of any particular city or community in the State, are not subjects fit to be presented to the consideration of the Court in this case, either with a view to invoke its condemnation of the policy of the State in this regard, or with a view to any influence such considerations might have upon the mind of the Court in deciding the proper and only judicial case before it.

No person could maintain an action in a Court of the State solely on the ground that the value of his property was deteriorated, or his general business interests injured, by any bridge, of any sort or description, which the State might authorize over the Hudson at Albany, so long as its authority over the subject as a sovereign power was not brought into question. Such general and incidental injuries to individual property, or to the business affairs of a particular locality, from the action of the State, in a work of public improvement, cannot have redress at the hands of the judiciary of the State. The redress, if any is to be had, or ought to be had, can come only from the legislative authority, upon the petition of the parties aggrieved.

If this bridge had been erected, and an action at law was brought on the ground of a claim of personal right to the free navigation of the river under a paramount law of Congress, the State Court might maintain that right. The action being at law, the recovery would be of damages in the particular interest secured to the plaintiff under the law of Congress, and nothing more. The action would be confined to the injury accruing from the interruption of his personal right to navigate the river. Injuries to property and interests which are in no way under the special protection of the general government, but remain under the guar-

dianship of State laws, could not be made the ground of an action.

No suit in Equity for an Injunction to prevent the erection of a bridge, could be maintained in a State Court at all. No State Court would sit to hear an application for an Injunction by a private party, against the State, or against its agents created to carry into effect a measure of public improvement, on the allegation that the act of the Legislature was in conflict with a paramount law of Congress, unless the alleged conflict was apparent on the face of the Act, or was clearly inevitable if the proposed measure should be carried into effect. It would refuse to lay its hand upon the State, or its constituted agents, in the way of judicial interdict, as an unauthorized, and unseemly exercise of judicial authority. It could exercise such an authority on no other ground than that the State was about to commit a public nuisance, against the United States, by placing, or authorizing, an encroachment or obstruction to navigation, upon its own soil and property in the Hudson River, while, as yet, nothing appeared to impeach the perfect authority and validity of the law of the Legislature, but an allegation that a conflict between that law and some act of Congress, not apparent or inevitable, from the face and terms of the law, might arise hereafter, if the measure of the State should be prosecuted to completion.

This Court, I suppose, can exercise no other or larger jurisdiction in this case than a State Court could or would exercise if the same suit had been brought originally there, and the Court can have no rule of decision, in the absence, or beyond the scope, of Congressional legislation, but the law of the State.

This suit in Equity for an Injunction to prevent the proposed bridge being erected, can only be maintained on the ground that it would be a public nuisance against the United States. If it would not be that, the complainants certainly cannot maintain their suit for the private injury they set up

as likely to arise from an interruption or impediment to their personal right to the free navigation of the river. The nuisance, if any, is to arise from an unlawful obstruction to the navigation of a public river. It will consist in this, and nothing else. It will be because the public of the United States, or at least such portion of the public as may, like the complainants, be armed with a supposed special authority from the general government to navigate the river, will be interrupted, or unlawfully impeded, in the use and enjoyment of this common right. It will not be a public nuisance against the United States, of which this Court can take notice, because the property or business interests of individual citizens of the State, or of any number of them, or of any particular community in the State, may be, or will be, injuriously affected as incident to the unlawful obstruction of the navigation of the river.

If then this Court, consenting to entertain this case on a Bill in Equity, (which I shall insist it ought not to do) should be of opinion that the proposed bridge, if erected, would be an unlawful obstruction to the free navigation of the river, as secured or guaranteed to the public, or a portion of the public, by the legislation of Congress, and therefore a public nuisance and offence against the United States, the Court, of course, if it thinks it has the power, will so decide. But the Court cannot be legitimately aided in reaching that conclusion by receiving suggestions, or proofs, to convince it, that the public policy of the State in this measure, as a State policy, was wrong, and that instead of benefitting, it would inflict injury on its own interests and its own people, unless its hand was stayed by the authority of this Court. Much less can the Court go beyond the jurisdiction which the legislation of Congress may be found to give it, in regard to the alleged public nuisance, to find a substantive ground of judicial action in any injuries charged, or likely to arise to the complainants, or to other citizens of the State of New York, in their

property or interests, as incident to the erection of the proposed bridge, and not arising from any direct violation of their rights of free navigation.

Quite the contrary of all this. The courtesy due to a State requires the Court, (so I presume it will think,) to assume that the State has acted wisely in this measure in respect to the proper interests of the State, and of its own people; that there is, as the Act of the State indicates, a strong necessity for a bridge at Albany—a necessity for which the State was bound to provide, if it could, in the way proposed; that the bridge would be of great and general benefit to the people of the State, and all others having occasion to use it; and that if incidental loss or damage should accrue from the measure to any, few or many, in respect to their private property or their general business affairs, the justice of the State may be relied on, with sure confidence, to redress their grievances.

The principle for which I contend here was fully recognized, I think, by this Court in the opinion delivered by Chief Justice Marshall, in the case of the Blackbird Creek Marsh Co. (Wilson vs. Blackbird Creek Marsh Co., 2 Peters R. 245; and 8 Curtis R. 105.) In that case, a dam had been thrown across a navigable creek by the authority of the State of Delaware, which of course cut off the rights of navigation, and any other rights and privileges, of all who had been accustomed to use the creek. "But this abridgement," said the Chief Justice, "unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance." In other words, a party claiming a right to navigate this Creek under the Constitution, or a law of Congress, may be heard in this Court to complain of the injury. And if the party establish this right of navigation so as to entitle himself to the protection of this Court, he may have his redress, but his redress must be confined to this injury. He cannot go

beyond this ground of claim, and ask this Court to entertain his complaints of other alleged greivances, or injuries to other property or business affairs, of his own or of other persons, not under the special protection of the general government, which may be unfavorably affected by the act of the State.

III.

If this case, instead of being looked at, as it must finally be, as necessarily involving the question of public nuisance, should be regarded as involving no judicial question, but that of the private and personal right of the complainants to the free navigation of the Hudson River, the Court I think, would see how impossible it is that this suit in Equity can be maintained. In this view, the case must turn strictly on the question of repugnance to the Constitution, or of a conflict of laws, as between the parties to the record, one party claiming rights under the Constitution of the United States, or a law of Congress, and the other claiming conflicting rights under a State law. Viewing the case in this light, and so it seems to have been viewed by the learned Judge, who first heard the cause—the suit must, I think, be regarded as prematurely brought. Viewed in this light, this is a Bill in Equity, not resting on a charge of public nuisance, which threatens to work a private and irreparable injury to the complainants' property, or interests, but resting on a claim of personal right in which the complainants seek to be quieted by an injunction. I suppose it cannot be doubted that this is a branch of Chancery jurisdiction never exercised except where the right at law is first clearly established. The right is never tried on

a Bill in Equity; the right must be settled and undisputed, before a Bill to quiet the right can be entertained.

But in the view of the case now taken, the suit is prematurely brought, not only because the right at law is not settled and undisputed, and therefore cannot be quieted by injunction, but also because, if the Court was disposed to try the right on this Bill in Equity, the question of a conflict of laws, on which the right claimed by the complainants must turn whenever the right is tried, has not arisen, or is not presented in a way to enable the Court to take notice of it.

The Act of the Legislature authorising the bridge, remains without execution, and therefore no actual conflict has arisen or manifested itself, or could do so, between this Legislative Act, and the Act of Congress relied on by the complainants as their warrant of title to the free navigation of the Hudson River.

There can be no question here of repugnance in the Legislative Act, arising on its face, and in its terms, and manifest intent, to any special provision in the Constitution of the United States. We know there are cases in which such repugnance would appear on the face of a State law; as if a State should, without the consent of Congress, lay duties on imports, or a duty of tonnage, in manifest violation of express prohibitions in the Constitution. So a State might pass an Act, which should be, on the face of it, so manifestly designed to be a regulation of commerce in some particular, wherein Congress had already fully legislated, under its power "to regulate commerce" (understood now on all hands to be an exclusive power) that such Legislative Act would be repugnant to the Constitution, because in conflict with the Act of Congress, by its very terms. Such precisely was the conflict of Congressional and State Legislation in the great case of *Gibbons vs Ogden*, [9 Wheaton, R., 240.] The Act of Congress gave authority to all vessels of a certain character, and having

a license under that Act, to pass freely, over all the open, navigable waters of the United States, including those of the Bay of New York, and the Hudson River. The Act of the State purported to give authority to a certain class of these same vessels, to navigate the open waters of New York, on having a license under that Act, and forbade all vessels of that particular class to enter upon, or use those waters, without such State authority, under heavy penalties. Nothing could be more palpable than the conflict of laws in this instance, on the face of the Acts themselves.

In all such instances as those now referred to, in a proper judicial case, the Court would have no difficulty in discovering and pronouncing on the repugnancy of the State law to the Constitution, or its conflict with a law of Congress, from the character of the State law. No judicial case *at law*, however, could arise even here, without some act done under the State law to make the occasion or the foundation of a suit. And if a Bill to quiet a right as against such a legislative Act could be maintained at all, it would be on the ground that the right was clear and undisputed by reason of the character of the legislative enactment.

There is, however, a manifest distinction between such cases as I have just referred to, and one where the State legislation complained of has been enacted under an original, undoubted, sovereign power remaining in the State, subject though the power may be, to be restricted and limited by Congressional legislation under another and a different power, and where the Act of State legislation is not, on the face of it, in its terms, or in its plain intent and meaning, or by neccessity if carried into execution, repugnant to any provision of the Constitution, or in conflict with any law of Congress.

In such a case it is clear that no action *at law* could be brought by any party in a Court of the United States, so long as no act or proceeding in execution of the State law, or under color of its authority, has taken place to interfere

with, or in any manner disturb, the perfect enjoyment of all rights claimed and exercised under the authority of any Act of Congress. No foundation could be laid for an action at law. No party could, in an action at law, arraign a naked Act of State legislation before this Court, and ask for its condemnation. He must come here complaining of some wrong, or some loss or damage, for which he holds his adversary responsible.

Take the case before the Court. It is clear that these complainants cannot maintain an action at law in this Court against the Albany Bridge Company. They claim the right of freely navigating the Hudson River at and above Albany, under the authority of an act of Congress, and a license to that effect. But so long as nobody disturbs them in that right, they have no injury or damage to complain of.

No judicial case, then, could be made to give the courts of the United States jurisdiction *at law*, where the question is one of repugnance or conflict, so long as no act or proceeding has taken place under the State legislation resulting in an actual collision of rights and interests. And therefore it is evident that if the Court can entertain a case on a Bill in Equity, where the question is one of repugnance or conflict, before any collision of rights or interests has taken place, then its jurisdiction in Equity stands wholly separated, and apart, from its jurisdiction at law, to this extent; its jurisdiction in Equity precedes its jurisdiction at law in the same identical case, and is exercised when no jurisdiction at law in the same case can be exercised.

The doubt here raised is not to be determined by what may take place in the State Courts under apparently analagous circumstances. The State Courts have general jurisdiction; the Courts of the United States have such special jurisdiction as is given them by the Constitution, and the legislation of Congress. The equity powers of a State Court are a part of its general jurisdiction; the equity powers of the Courts of the United States are a part of its

special jurisdiction. In a State, where a party cannot bring a suit at law because he has not yet suffered an actual wrong or injury, but is only threatened with mischief, and therefore brings his suit in Equity, it is entertained, if at all, merely on some rule of Chancery practice. The general jurisdiction of the Court covers the whole case, and if the party cannot be heard on the law side, he may on the Equity side of the Court. But a Court of the United States stands in a very different relation to the same subject. It has a special jurisdiction in cases in law and equity, arising under the Constitution and laws of Congress. A case must arise, before jurisdiction attaches; and, on a question of repugnance or conflict, no case can arise until an actual collision of rights or interests has taken place; and until a case thus arises, the Court has no jurisdiction in law or equity. It is not two jurisdictions over the same question which is given to the Court, but one jurisdiction, to be exercised when a case arises, and the jurisdiction attaches, on the law side, or the equity side, of the Court according to circumstances.

The position which I maintain is, that no question of repugnance or conflict, not apparent on the face of a State law, can properly come before a Court of the United States in a suit originally brought there, until the repugnance or conflict has shown itself in an actual collision of rights or interests. It is doubtful, perhaps, whether the mere passing of an act by a State legislature which the Constitution expressly forbids it to pass, or the mere passing of an act on a subject—the regulation of commerce for example—on which Congress has already legislated, under a power conceded to be exclusive, is sufficient to authorize a Court of the United States to interpose to arrest that Act by a judicial negative, or veto. At least it would seem to be clear that the mere passing of a legislative Act cannot justify such an interposition, when such Act has been passed by a State, under an independent and conceded

power, which makes provision for a measure of State policy entirely within its acknowledged competency to provide for; which is not on the face of it, or by its terms or intent, repugnant to, or in conflict with, the Constitution or any law of Congress; which must of necessity be a valid Act of legislation both in its inception and maturity, and in its operation, so long as it does not in fact, and by actual collision, conflict, or in any manner interfere with, the fair enjoyment of any rights, property or interests secured by a paramount act of Congress. The case here supposed is precisely the one now before the court. Let us see exactly what this case is, and how it illustrates the question of jurisdiction here presented.

The Act of the Legislature of New York which this Court is called upon to arrest, and forbid being carried into effect, is an Act for establishing, or authorizing, a bridge over the Hudson at Albany. I do not understand that the power of the State to establish a bridge at this point, possessing as it does both banks of the river, and the whole river in its whole extent, is denied or questioned in any quarter. The utmost that is said in derogation of the power is, that it is subject to the power of Congress "to regulate commerce." What that amounts to we shall see.

In the language of Mr. Chief Justice Marshall in *Gibbons vs. Ogden*, this Legislative act "formed a portion of that immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect *turnpike roads, ferries, &c.*, are component parts of this mass."

The power to establish this bridge stands on precisely the same ground as the power to make roads, canals and railways on the land. It is impossible to distinguish between

the two cases. If the bridge is subject to the power of Congress over commerce, because it spans a navigable water, so are the highways of commerce on the land, subject to the same power, wherever such highways are, or may be made, routes and channels of foreign or inter-State commerce—a position which I shall have occasion to dwell upon more emphatically for another purpose, in a subsequent part of this argument.

Indeed, the power in these cases is one power, and not two powers. The power to make a road in or through a State, includes the power to make that road continuous by a ferry or a bridge, over a navigable stream. A ferry-boat is a moveable bridge; a bridge is a roadway over a river. Every ferry over a navigable water is an impediment or hindrance to some extent, sometimes to a very great extent, to the use of the highway of the river in the direction of the stream. In some cases, this impediment is vastly greater than a bridge produces, provided with a suitable draw. A bridge is a substitute for a ferry, and whenever a bridge can be conveniently established, with suitable provision for the fair accommodation and use of whatever passes up and down on the highway of the river, such bridge is demanded as a better and more perfect roadway than the ferry. There is hardly one mark of the advancing civilization of the age in which we live, greater or more striking than the vast increase of bridges, and the progressive skill and genius employed in their construction, all over the world. It has been a subject of rival claims to superior civilization and advancement between England and France—the number, magnificence and superiority of the bridges in these countries respectively. What would Paris be without the bridges over the Seine? What would London be without the bridges over the Thames? And these are navigable streams. The Thames is navigable for barges thirty-seven miles above London. Twenty-five years ago, more than three thousand lighters, barges and punts were in use

above the lowest London bridge. More steamers bow the heads of their chimneys to the various bridges over the Thames at London, in passing under them, probably in one hour, than would have occasion to pass our bridge at Albany in a week. In the early part of this century, in England, a Parliamentary commission was raised, consisting of twelve members, including the then Speaker, and the Chancellor of the Exchequer, with Thomas Telford, the great architect of the period, as the engineer of the commission, to promote bridge building, especially in the northern district of Scotland, where this civilizing process was more especially needed. In 1812, under the auspices of this commission, 1486 bridges had been constructed, many of them large erections, and some of great magnitude. There is hardly one of the great rivers in the more advanced countries of Western Europe that is without its bridge or bridges, though these rivers almost invariably traverse, or separate, two or more States. A bridge is built, by any sovereign, over any river, on that part of it within his own territory and jurisdiction, he taking care to provide due and fair accommodation for the passing of the bridge by all commerce and navigation in which his own people, or other States, are interested. The government of Prussia has just completed a new and magnificent stone bridge over the Rhine, at Cologne, in place of the bridge of boats which for so many years has occupied that position. This can only be passed by a draw.

In the provision, by a ferry or a bridge, for the crossing of a navigable river, two highways meet and cross each other, just as two highways on the land, running at right angles to each other, meet and cross one another. Two objects meeting at the crossing, cannot occupy the same space on the same, or nearly the same, plane or level. They must accommodate each other, and, if necessary, the police power of the State must step in to regulate the matter.

In all this there is no distinction to be made between the water and the land.

It would be to insist on comparative barbarism, on returning to a state of comparative primitiveness in science, arts and general civilization, to insist, at this day, on the antique and obsolete notion of the superior and monopolizing rights of navigation on navigable streams, as against all rights, or any but the most restricted and meagre rights, of traverse across such streams. The modern railroad, the greatest of all advances made in modern times in physical improvement, giving to commerce and locomotion on the land a facility, rapidity and precision which even steam cannot rival on the water—this must forever put an end to the idea, once perhaps prevalent, that navigation on rivers is entitled to anything more than equal rights, equal privileges, equal facilities, equal protection, with the commerce and travel which follow their great and crowded routes across these rivers.

I venture to state, without fear of contradiction, that, in the very instance before the Court, taking the evidence in the case in spite of all its contradictions and exaggerations, that more tons of freight alone—a great many more—now cross the river at Albany, yearly, in connection with the railroads (and with a bridge the amount will be greatly increased,) than will have occasion to use the draw for passing the bridge up and down the river. Canal boats and barges will pass under the bridge, and so will the whole class of small steam-tugs, with or without a joint in their smoke pipes, without inconvenience. This will leave but comparatively a small part of the navigation employed at or above Albany, to pass the bridge by means of the draw. What in the world is there in sense or reason, what is there that would not be shocking and shameful to sense and reason, to hinder the State and public authorities from according to the vast amount of commerce that traverses the river, even if not half as large as it is, equal pro-

tection and equal facilities with that which moves on the river in the direction of the stream? And if some of the commerce in these two branches must submit to partial inconveniences, what is there in sense or reason, to justify the laying of the whole burthen on that which traverses the river, and none at all on that which employs navigation in the direction of the stream?

And, then, for the persons who are to be accommodated in traversing, and those in passing up and down the river at this point. The comparison is, of three to four thousand daily of those who cross the river at this point, to less than 150 who pass up and down. Can anybody suggest a reason why the government should not take care of the rights and interests of the three or four thousand, as well as of the 150—of the million and more of passengers yearly in one direction, as well as of the 35,000 in the other direction?—especially while in one case the travel, with all the vast business and social interests connected with it, flows on steadily from years' end to years' end, and in the other it is periodical, and is wholly suspended for three or more months in the year.

If the power to make roads, canals and railways is a conceded and indispensable power belonging to the State, which it would be a shameful dereliction of governmental duty not to exercise, to the extent of its ability, it must be equally a conceded and indispensable power belonging to it, to establish bridges over the navigable waters within its territorial sovereignty and jurisdiction, wherever they are practicable, and the public interest demands them, and which it would equally be a shameful dereliction of duty not to exercise. I know of no distinction that can be made between the waters within the territorial limits of the State, and the land, in regard to soveregnty and jurisdiction in the State Government. There can be no greater error, in my judgment, than to suppose that the Constitution of the United States, by any of its provisions, or by any inference

to be drawn from the character, necessities or objects of the government established by it, takes from the State its general sovereignty and jurisdiction over its navigable waters, any more, or in any greater degree, than it takes from it its general sovereignty and jurisdiction on the land. The State is sovereign over the waters in the same sense, and in the same degree, that it is on the land. As sovereign, it commands in all public places, as on highways and rivers. A river is a highway devoted to the use of the public, just in the same sense in which a road is a highway devoted to the use of the public. That grand and comprehensive provision of the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," which so beautifully constitutes the people of the United States one people, without trenching on the separate communities into which they are divided, or the general sovereignty of the governments of those communities, undoubtedly enlarges that public to whose use the navigable waters of the several States are devoted, from the public of the State to the public of the United States. And in exactly the same manner, and in the same degree, are the highways of a State devoted to the use of the whole people of the United States, instead of being limited to the people of the State. No State can impose any restrictions, terms or conditions, on citizens of other States, in the use of its highways, whether of water or on land, than such as it imposes on its own citizens. And it can give its own citizens no privileges, immunities or advantages in the use of these highways, that do not at once, and equally, belong to the citizens of all the States. But the State, as sovereign, does not the less command in these public places, as it does elsewhere, within its territorial limits.

The boundaries of the State of New York include all the waters of the great Bay of New York as far as Sandy Hook, or to the open sea, and the waters of the Sound to the eastern line of the State across that arm of the sea; and

of course they include all its interior waters. Within all these boundaries, water and land included, the State is everywhere Sovereign. It is sovereign in the same sense in which it was sovereign before the Constitution, notwithstanding the surrender of certain specified powers which it cannot now exercise at all, and notwithstanding the fact that among its general powers not surrendered, there are some of which the exercise is subject to restriction and limitation by the exercise of some power on the part of the general government which has been surrendered. The State has not lost its general sovereignty and jurisdiction because it has surrendered its independent power to lay duties on imports and exports, and to lay duties of tonnage; nor because its power to legislate in respect to its public highways, whether of water or on land, may be subject, in a certain degree, to the paramount power of Congress "to regulate commerce;" nor because the judiciary of the United States is clothed exclusively with the admiralty and maritime jurisdiction of the country. In this latter particular, this Court has said that this power does not carry a cession of the water where these cases may arise, or the general jurisdiction over them. This adheres to the territory, and to the government to which the territory belongs. (U. S. vs. Bevans, 3 Wheat. R. 316.)

The State owns the soil under all the navigable waters within its boundaries—taking the term "navigable" in its common law meaning, as applied to waters where the tide flows and ebbs. The State owns the soil under the navigable waters of the Bay of New York, and of the Hudson, and it grants the soil at its pleasure. (Commissioners of Canal Fund vs. Kempshall; 26 Wendell's R. p. 414; Verplank's opinion.) The Commissioners of the Land Office have power to grant these lands, and have frequently exercised that power. The State has granted the land under water around the city of New York, to that city, for the purpose of constructing piers, wharves and docks for the

uses of commerce, at that great centre of trade and navigation. At other points and places on the Hudson, the State has made similar grants for similar uses. The State itself constructed the great pier and basin at Albany, in connection with its canals, and has granted land under the water on the opposite side of the river at this place, for piers and wharves. And wherever such grants have been made, encroachments have necessarily been made to some extent, on the bed and highway, and public easement, of these navigable waters. And nobody that I have heard of, has thought of questioning the sovereignty and jurisdiction of the State in this matter, or its right to grant the land, and to authorize these encroachments on the free flow and navigation of the river. The general goverment itself has received frequent cessions from the State, by formal transactions, both of the soil under these same waters, and of the general jurisdiction (with some special reserves) over the sites thus ceded. It has received these cessions in the Bay of New York, and at various points in the Hudson River, for light houses, and other erections, necessary for national uses.

Some years ago the State authorised a bridge over the Hudson at Troy. This was opposed by those interested in the navigation above Troy, where the tide flows, but after a trial in the State Court, and a decision, accompanied by a very learned and able opinion, in favor of the right, the opposition was abandoned, and there the bridge now stands, with only a very narrow and inconvenient draw, for the accommodation of the navigation above it. Many years ago the State, in connection with its canals, constructed a dam across the river at a point below the flow of the tide, with a lock through which all navigation above has to pass.

In virtue of the same sovereignty and jurisdiction, which the State has been exercising ever since the Union was formed, it has now undertaken to establish a bridge at

Albany. This is opposed, almost of course, by those who are interested in the navigation above this point, and by the parties most interested in maintaining the bridge at Troy.

I do not understand, however, that the general sovereignty and jurisdiction of the State, over the waters of the river are denied, or the general right to make or authorise erections therein, provided the freedom of navigation be preserved. What is insisted on, is, that the right to establish a bridge is subject to the power of Congress to regulate commerce; that Congress has legislated under this power in the Act for granting licenses for the coasting trade; that the complainants, and others, are engaged in navigating the river under the authority of such licenses; that these licenses secure to them the right to the free and unobstructed navigation of the river, at and above Albany; and that in their opinion, and in the opinion of *their* witnesses, the bridge, if built, will not leave to them, what they consider a free and unobstructed navigation.

The bridge, it must be remembered, has not been erected; it was not erected, or begun, when this suit was brought, and it has not yet been erected, or begun, because two years and a half ago, the judicial power of the United States, was successfully invoked to lay the State, or its agents, under interdict against the erection. The State, by the very terms and conditions of its enactment, had made the most careful and anxious provisions for preserving and maintaining "the free navigation" of the river—a matter in which the State had quite as deep a stake as any body else, in or out of the State, could have. The free navigation was to be preserved, first by the elevation of the bridge "so as to allow under it the free passage of canal boats, and barges without masts," in which, in truth, the great bulk of the commerce above Albany is borne; and next, by a draw, or draws, "of sufficient width to admit the free passage of the largest vessels navigating the river."

The Act, with its supplement, fixes the minimum width of the draw, or draws, which must therefore be of the most ample width, and such as could only be constructed by the advance and triumphs of modern science and skill. Other provisions are made for rendering voluntary aid, without cost, by means of steam tugs, to facilitate vessels in passing the draws of the bridge; and other provisions still, for the prompt application of remedial measures for keeping the bed and channel of the river free, if by possible chance, the piers of the bridge should be found to cause any obstruction in them. Finally, the Act provides, under severe penalties for any neglect, for the prompt and efficient management of the bridge, and of the draw or draws, to accommodate and facilitate vessels in a safe and easy passage through the bridge, at all times of the day and night.

Now it is in the face of all these careful provisions, embodied in the Act itself, for preserving the free navigation of the river, before the erection of the bridge is begun, and before the right or interest of any human being, as claimed under an act of Congress, has been in any manner encroached upon or disturbed, that a question of repugnance to the Constitution, or of conflict with such act of Congress, in the law of the State authorizing the bridge, has been raised, which the Courts of the United States have been asked to entertain, and, upon the anticipation of events that no mortal man can say will ever happen, and, on testimony, of necessity and in the nature of the subject, amounting to nothing but a purely speculative prognostication of evil, to forbid the law of the State being carried into effect.

Now, what I insist upon is, that no question of repugnance or conflict has arisen in this case of which the Court can take cognizance; that no judicial case can arise, where the question is one of repugnance or conflict, not apparent on the face of the legislative Act, until an actual collision

of rights or interests takes place in the working or operation of the law against which repugnance or conflict is alleged; that no judicial case can arise, in law or equity, on an allegation of repugnance or conflict, upon a naked or unexecuted law of a State; that if it can arise where the repugnance or conflict is palpable on the face of the law, it cannot arise, on such an allegation, upon a naked or unexecuted law of a State, where that law, on its face, and in its terms, and plain intent and meaning, is confessedly not repugnant to the Constitution, or in conflict with any act of Congress; and that the Court cannot create a judicial case for itself, nor can parties create a judicial case for it, when the case is such as I have described, by means of allegations, and volumes of proofs, offered and received, to show that it is intended to carry the law into effect, and that, if carried into effect, apprehensions and opinions are entertained that certain rights or interests claimed under an Act of Congress, will or may be impaired or disturbed, and thus a conflict between the law of the State and such Act of Congress would or might be established. I hold that the Court cannot anticipate a conflict of laws in any case; that there is no conflict of laws in a case like this before the Court, of which the Court can take cognizance, until an actual collision of rights and interests takes place to show the conflict, and to lay the ground for a judicial case; that the Court must wait until the rights or interests of some party, claiming under the authority of the United States, have been impaired or disturbed by some party acting under the State law, or is alleged to have been so, before it can entertain so grave a question as that of conflict between the two laws, and the two governments enacting them respectively, and where the result may be the condemnation of the law of the State, upon mere speculation as to its operation, and the arrest of the government of the State, in a measure which may be of vital importance to the

interests and prosperity of the people over which its sovereignty is exercised.

If a naked, and as yet unexecuted, State law can be brought under the revision of the National Judiciary, in the form of a proceeding in Equity, and there forbidden to be carried into effect, not from what may appear on the face of the law, but from testimony received to show what will be its probable, or possible, operation if not thus forbidden, then I think no one can fail to see that the Judiciary, in all such cases, performs an office quite foreign to its character as a Judiciary—an anomalous office, partly executive and partly legislative, and such as we must all be quite sure was never intended to be created, or bestowed, on any branch of the National Government.

The subject of vesting just such an authority in Congress, or in some other hands to be devised for the purpose, was proposed, and very earnestly debated, in the Convention which framed the Constitution of the United States. There was hardly any other single topic which was longer under debate, or more deliberately considered. Congress was the body in whose hands it was generally thought best to lodge the power of revision and veto, over State legislation ; though suggestions were made of a Commissioner for this purpose to reside in each State, or to make the Governors of the States appointees of the General Government, and clothe them with the power of revision and an absolute veto. Many of the leading men in the Convention advocated such a power, Mr. Madison, perhaps, more persistently than anybody else. The main object was the exercise of the very identical power we are now considering—that of revising and arresting, by an absolute negative, all State laws which might be deemed to be repugnant to the Constitution, or in conflict, or likely to come into conflict, with any law of Congress. Of course, the question of repugnance or conflict was to arise on the naked law, before it should be carried into effect, and was to be determined

upon the character and provisions of the law itself, or upon such an inquest, and such investigations into the probable, or possible, operation of the law, if allowed to be carried into effect, as should satisfy the revising authority. It was not until a late period in the session of the Constitutional Convention that this project was abandoned. It was not abandoned until its advocates became satisfied that the States would indignantly reject any Constitution containing such a provision—one which would have effectually stripped them of all proper sovereignty, and left them with no more authority or dignity than a Board of Supervisors in a county. Fortunately, when the powers to be given to the Judiciary of the United States, came at last to be adjusted and settled, and the language carefully selected and fixed by which those powers were created and conferred ; when it was seen that its authority extended to all judicial cases arising under the Constitution, laws and treaties of the United States, and when, finally, the important and vital principle and provision was added that the Constitution, laws and treaties of the United States should be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding;" when all this was done, all parties became satisfied that a much better, wiser and safer adjustment had been made of the difficult and delicate problem of securing harmony between the State Governments and their laws, and the Constitution and laws of the United States, than could have been done by any direct power of revision and negative over State legislation. (Vide Curtis Hist. of Constitution, vol 2, pp. 430, 437, 438, 439 and 440; 5 Elliot's Debates, pp. 170–4, 209, 210, 251, 321, 468, 469, 539, and Index, tit. "Acts," p. 604)

It will not do to say that this power of revision and negative was merely shifted from Congress, where it was first proposed to lodge it, to the Judiciary. No such power was conferred by the Constitution, and if it had been, and had

been so understood, that instrument would certainly have been rejected by the States. The power in the hands of the Judiciary would certainly not have been deemed less exceptionable than in the hands of Congress. Where inquisition and investigations are to be made, and volumes of testimony taken and weighed, on subjects so peculiarly of parliamentary or legislative cognizance, as in the very case now under review in this Court, before a question of repugnance or conflict alleged against a State law can be decided; certainly no one can say that such a case is not fitter for a parliamentary committee than for the Judiciary. Must not every one say that it is fit only for such a committee, and for legislative action and determination, and not at all for a judicial body? Certainly, every one must see that the true way and the only way—a method perfectly effectual too for all practical purposes—of dealing with this subject of State legislation, to keep it in practical harmony with the Constitution and laws of the United States, and at the same time relieve the necessary interference with it, in cases of alleged repugnance or conflict, of all that is most offensive to the dignity and sovereignty of the State, was the very course adopted by the Constitution. By this means, all State legislation, passed under admitted powers, stands as valid law, on the authority of the sovereignty which enacts it, until a conflict declares itself by some actual collision of rights and interests between parties, claiming respectively under State legislation and under the Constitution or legislation of Congress, and then the Judiciary is invoked to settle the question on a judicial case, and in a strictly judicial way. (2 Curtis Hist. of Const., p. 54.)

It adds, I think, force to the view I have ventured to present on this subject, that previous to the Albany Bridge Case, no occasion had ever been found on which it was thought proper to employ a Preliminary Injunction to arrest a State law, as yet but a naked and unexecuted enactment, and a valid law on the face of it, on an allegation of repug-

nance or conflict. And if the Injunction should be made perpetual, it would be the first example and instance of such a conclusion being reached, in any similar case. If I am mistaken in this, the Court will know. I have not found or heard of such a case.

In the leading case of Gibbons vs. Ogden the collision of rights and interests was actual and flagrant when the injuction was asked for and granted in the State Court, and of course when the case came before this Court on appeal.

In the Blackbird Creek case, (8 Curtis, 105,) a dam had been constructed across the creek, and a collision in respect to rights and interests had occurred.

Applications for Injunctions to prevent the erection of bridges over navigable waters have been asked for in several instances, and the Courts have entertained the cases—the question of jurisdiction not having been raised. It seems to have been assumed that the Court had the power to grant the Injunction, if a case for it was made out; but no such Injunction has been granted, I think, in any case. Yet the distinction does not seem to have been adverted to, between the act of a mere trespasser in placing obstructions in a public river, complained of in an English Court of Chancery as threatening injury to an unquestioned private right, and erections authorized by State legislation, which, on its face, contemplates no unlawful obstruction, and which, as I hold, cannot be complained of in this Court, by a private party claiming under a law of Congress, so long as his right, whatever it be, remains actually undisturbed.

In the Cuyahoga River Bridge case, before Mr. Justice McLean, (3 McLean R. 226) the complainant relied on the ordinance of 1787, for his claim to the free navigation of this river, which he insisted would be obstructed by a draw bridge. The application was denied.

In the Rock Island Bridge case, before the same judge, (4 McLean's R. 517) the application for an injunction was denied. There the United States was a party, and com-

plained not only of prospective injury to the navigation, if the bridge should be erected—a ground of claim in the case which the Court declared the United States as a private party could not set up—but complained also of special injury, already done by excavations and otherwise, to Rock Island, of which the United States was proprietor. The case turned on this latter complaint.

In the cases arising in New Jersey before Mr. Justice Grier, (vol., Alb. Bridge case, 74) the application for injunctions was denied. In these cases there was a complaint of the proposed erections as public nuisances, and they appear to have been considered in that view.

In the Wheeling Bridge case, (19 Curtis R. 621) the application for an injunction to prevent the bridge being built, was in behalf of Pennsylvania, and was put expressly on the ground of nuisance. Before the case came to a hearing the bridge had been completed, and a supplemental Bill set forth that fact, and complained of the bridge, not as a prospective, but as an actual nuisance, doing special damage to the complainant. On this ground the case appears to have been heard and decided.

In the case now before the Court, on the hearing for a Preliminary Injunction, Mr. Justice Nelson appears to have considered the case as analagous to cases in the English Court of Chancery, where the title of the complainant was clear, but the obstructions denied, and where the question of obstruction or not, was the only one to be tried. These were cases of unauthorized obstructions by individual enterprise. And even there, Chancery would not try the question of obstruction, which here the Circuit Court proposed to do, and thereupon issued the Injunction till the further hearing on that point in Equity.

The Court regarded the Complainants as having an unquestioned "legal right to a free and unobstructed navigation of the Hudson River, secured by the Constitution and Acts of Congress;" and stated that the right was understood not to be denied on the argument.

The mistake in this statement, I suppose, consists in inadvertently stating the "legal right" supposed to be conceded, altogether too broadly. The right to navigate the river was admitted, but the right to build the bridge, just as authorized by legislative enactment, was insisted on at the same time, and any right of navigation which could not be enjoyed with such a bridge, was not admitted, but denied. The legal right of the complainant "to a free and unobstructed navigation," in the broad sense of these terms, was not therefore clear, and was not unquestioned. There was an admitted right of navigation, but not in exclusion of the bridge, and just such a bridge as the State law contemplated. The bridge as contemplated, would leave all the navigation the complainant was entitled to, and any larger right of navigation than this was denied. This was the defendant's position.

Here were opposing claims of right under the legislation of different governments. The laws in both cases were passed by perfectly competent authority; and no supremacy could be asserted for the law, under which the complainants claimed, over the law under which the defendant claimed, until the right of the complainants, whatever it might be, was encroached upon by the measure adopted under the State law. The laws themselves did not conflict; and no case, as I suppose, could be made for the Court until an actual collision of rights, or what might be claimed to be such, should take place. Then an action at law would decide between the opposing claims.

But all this was anticipated by the Court. On a Bill in Equity, a broad, and disputed right of navigation, but still undefined, was held to belong to the complainants. And, thereupon, though the State law contemplated no obstruction to any reasonable right of navigation, testimony was received on the one side and the other, on which the Court might try the question, whether, or not, an unlawful obstruction to the vague right of navigation as held by the

Court to belong to the complainants, might not be created if the bridge should be constructed.

We hold that the Court, on this Bill in Equity, if considered merely as a Bill to quiet a right by injunction, erred in entertaining either the question of right, or the question of obstruction.

IV.

But I suppose it is not to be doubted that all these cases where suits are brought in Equity to protect the rights and interests of the complainants in the navigation of public rivers against bridges, and the like erections, if they can be maintained at all, must stand on the charge of public nuisance against the alleged obstructions, and cannot rest on any other ground of Chancery jurisdiction. It is not an isolated private right which is set up in these cases. It is a right enjoyed in common with the public, or at least such portion of the public as have a common authority from the Government of the United States. What is complained of, along with the injury to a personal right, is an unlawful obstruction of a public navigable river, or common highway. This is a public nuisance, according to the doctrine of the common law.

The complainants in the case before the Court, have not neglected in their Bills to declare that the bridge, if erected, will be a common nuisance. In my further consideration of this case, I shall treat it as standing on this ground.

The first question to be considered, is, whether the Court has jurisdiction and authority to declare an obstruction to navigation, actual or threatened, in a public river, placed there without the authority of the United States, to be a public nuisance.

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I have referred already to several cases in which the Court seemed to take this jurisdiction for granted. The question of jurisdiction does not appear to have been raised.

In the Wheeling Bridge case, it is not to be denied that a majority of the Court held the bridge, as erected, to be a public nuisance, because in their judgment it obstructed the accustomed use of the River Ohio, to a certain class of vessels, navigating that river; and the right of the Court to entertain the case on a Bill in Equity, as a question of nuisance was elaborately maintained. Two members of the Court, however, dissented from this opinion, the Chief Justice being one of them, who utterly denied the jurisdiction.

As this was the first case, and is thus far I believe the only one, in which this question of jurisdiction was considered, I hope it may not be thought going too far, to ask that the question should not be deemed settled past all propriety of reconsidering it. Perhaps that case might be advantageously reconsidered, in more aspects than one. The decision was by a divided Court. The decree in the case, was never carried into effect, because Congress interposed by a special Act of Legislation, under its power to establish post-roads, to affirm the State Legislation in the premises, as not illegal, and not creating a nuisance, and to adopt the bridge, just as it was built, as a post-road. And I suppose all parties and persons, are now satisfied that it would have been a great misfortune, and a great calamity, not to Virginia only, but to the whole country, if the erection of that bridge had been prevented, or if being erected, it had been abated by the Court, as a nuisance. The case, therefore, as a whole, is hardly one to be followed as a precedent.

The majority of the Court put the right of the complainant, the State of Pennsylvania, to complain of the bridge, on the ground of private injury from a public

nuisance. She did not sue in her capacity of a sovereign State. She was before the Court in the position and light of any natural person, or ordinary corporation. She was not engaged in navigating the river under a license from the United States, and therefore could not complain that her rights of navigation under a law of Congress, were interfered with. But the right of all the people of the United States to the free navigation of the river was insisted on, as having been somehow or other secured by the legislation of Congress. Regulations of commerce by Congress, under which licenses for the coasting trade had been granted, and ports of entry established on the river, were referred to; and so was the compact between Virginia and Kentucky in relation to the free navigation of the Ohio, and the sanction of that compact by Congress. This compact seems to have been mainly relied on as establishing the general right of free navigation under the authority of Congress. But the complainant, as a legal person or corporation, who was not engaged in the navigation of the river in any way, and who had therefore no violated rights in that particular to complain of, could not make a judicial case for itself in this Court on that ground. If the legislation of Congress secured the free navigation of the river to all who chose to navigate it, and if the legislation of Virginia authorizing the bridge, was in conflict with that right, still the complainant was not engaged in the navigation, and no individual rights of hers in that respect had been disturbed by the bridge. And since she could not claim the protection of the Court against the legislation of Virginia as being herself engaged in navigating the river, under the authority of Congress, she was in no condition to invoke that protection for others who were thus engaged. It was not, then, her individual right of navigation which was complained of as interfered with by an obstruction constituting a public nuisance. She set up certain losses and damage to her interests in works of internal improve-

ment of which she was proprietor, as flowing directly from the obstruction, and on this ground of private injury from the obstruction, which she charged as a nuisance, her case rested.

The jurisdiction of the Court in this view of the case was, as I have said, elaborately maintained. It seems to have been put mainly on the ground that this Court had adopted the practice of the high Court of Chancery in England, where jurisdiction in analagous cases was entertained. But the question of jurisdiction in this Court was entirely distinct from any mere question of chancery practice. The question whether, on a Bill in Equity, this Court will proceed according to the practice of State Courts, or according to the practice of the Court of Chancery in England, does not seem to me to meet the question of jurisdiction. The Court say, "the usages of the high Court of Chancery, *whenever the jurisdiction is exercised*, govern the proceedings." But this does not go one step towards deciding whether the jurisdiction in this case can be exercised by this Court, according to law. If it cannot, no usages or practice of any Court can be applied to it.

The jurisdiction of the Courts of the United States is special and not general, and is just what the Constitution and laws of Congress confer on them, and this is as true of their jurisdiction in equity as in law. In Wheaton and Donaldson vs. Peters, (8 Peters, 658,) the Court said: "It is clear there can be no common law of the United States. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated."

This Court must have some law to give it jurisdiction. It has no general common law jurisdiction. Its authority to pronounce the bridge a nuisance must rest on the legislation

of Congress; either on such legislation directly applied to the subject, or on the Act of Congress which makes the laws of the State where the controversy originated, the rule of decision in a Court of the United States. If there had been any legislation of Congress which made this bridge, as partially obstructing the free navigation of the Ohio, a public nuisance, or if the common law of Virginia as modified by the Statute authorizing the bridge, made the bridge a public nuisance, then the Court had jurisdiction so to pronounce; otherwise it had no jurisdiction.

It cannot be pretended that the bridge was a nuisance by the laws of Virginia. No State Court of Virginia could have so pronounced. No Court of the United States, sitting in that State, could have so pronounced. A Statute of the State had authorized the bridge, and that was the end of the law in that State, so far as the allegation of public nuisance was concerned.

Upon what legislation of Congress, then, applicable directly to the subject, could the complainant rely to maintain the jurisdiction of the Court.

It is not pretended that there was any enactment of Congress, in terms, declaring obstructions, partial or otherwise, in navigable rivers generally, or in the Ohio in particular, whether by bridges, or other erections, public nuisances. There was no direct Legislation of Congress, on the subject of bridges over navigable waters; none defining what erections should constitute, or be deemed, obstructions, and what should not, or what obstructions should be deemed a nuisance, and what should not. And it is difficult to conceive how this Court could have jurisdiction to define and declare what erections in a navigable river, should be deemed obstructions, and public nuisances, and what should not, while it is certain that Congress, from which alone its authority on the subject must be derived, has never Legislated on the subject of obstructions to navigable rivers in any form whatever.

A public nuisance is a public offence, and those who establish or maintain it, are liable to indictment and punishment as public offenders. There can be no public nuisance which is not a public offence. And there can be no better test of the right of jurisdiction in this Court, in a civil case, to declare any act complained of a nuisance, than to enquire if any legislation of Congress, has declared that act to be a public offence. The Court in this case concede that it has no criminal jurisdiction in the matter, because Congress has passed no law, declaring the act of establishing such a bridge a public offence, and prescribing the punishment of it. Certainly, that is an abundantly good reason why the Court cannot exercise criminal jurisdiction in the case; but it is an equally good reason, why a civil suit cannot be maintained for a private injury arising from the act complained of. If there is no legislation of Congress, which makes the erection of a bridge obstructing navigation, a public nuisance and offence, whether provision is made, or not, for its punishment criminally, then certainly no private suit can be maintained for special damage, arising from it, on the ground of its being a public nuisance. It cannot be held to be a public offence, except by the legislation of Congress. There is confesedly no such direct legislation. There is nothing, therefore, to warrant the Court in deeming the bridge to be a public nuisance, or treating it as such.

At common law, the unauthorised obstruction of a navigable river, is a public offence, and punishable by indictment. (4. Bl. com. 167.) But, as we have seen, there can be no common law offence of this kind against the United States. Ten thousand obstructions of navigable rivers in the United States might be made, without one public offence against the United States, until Congress shall declare any such act to be a public offence. Obstructing the mails of the United States, is not a public offence, until Congress so declares it. Counterfeiting the coin of the United States

is not a public offence, till Congress so declares it. Surely the Courts of the United States, have no larger authority over the navigable waters of the United States, within the territorial limits of the several States, than they have over the public mails, and the public coin, in the absence or want of legislation by Congress, to provide for their protection. If Congress has thought, as it might well think, that the States themselves were the best authorities to protect their public waters against unauthorsed obstructions, and that serious obstructions of their own navigable rivers by State authority, was too remote a probability or possibillity, to requ're any legislation on the part of Congress, certainly, there can be neither any authority, or any occasion, for the Courts of the United States to intervene in the matter.

It seems to me to be sufficient to rest the objections to the jurisdiction entertained by the Court in the Wheeling Bridge case, where I have now placed them. But I shall have occasion to recur to that case in another part of my argument, and to present some further views which cannot fail, I think, to add strength to those already submitted.

It is most apparent to my mind, that the Court in the Wheeling Bridge case, in declaring the bridge over the Ohio to be an unlawful obstruction, and a public nuisance, as against the sovereign rights and authority of the United States—for the decision was exactly that, or it was nothing—declared what Congress had never declared, and had never authorized the Court to declare. I hope I shall be believed when I say, that in submitting my views of that case, I do so without any abatement whatever of the profound respect for this Court which it has been the habit and the pride of my whole life to entertain. I confess, at the same time, to the deepest anxiety, as a matter of the highest importance to great public interests, that that case shall not be deemed by this Court as a settled precedent for the leading doctrines which may be

thought to be embraced in the decision, and certainly not as establishing the jurisdiction and authority of the Court, without some more explicit legislation of Congress on the subject than any we now have, to declare what shall, and what shall not, be deemed obstructions in a public river, and when any such obstruction shall, and when it shall not, be deemed a public nuisance.

To come back now to the case before the Court. I ask the Court to apply to this case, the reasoning I have ventured to employ in reference to the Wheeling Bridge case.

If I do not greatly deceive myself, it is quite clear, that this Court has no authority to decide that a bridge, erected by State authority, over a navigable river within the territorial limits of the State, is an obstruction to the navigation of such a character as to be a public nuisance. It has no such authority, because Congress has not given it any such authority, and it has no common law jurisdiction in such cases, or in any case. Congress has passed no laws to forbid obstructions in public rivers, or to declare any obstruction a public nuisance. I go further than this, and maintain that it has adopted no legislation the object of which has been to control State legislation over the navigable rivers within the limits of a State, in respect to erections, such as piers, wharves and bridges, in or over such rivers, or in respect to any effect which may be produced by such erections upon the freedom of navigation. But I shall have more to say on this last position in another part of this argument.

V.

The Court cannot, of course, interpose to prevent the creation of a public nuisance, at the instance of a private

party, unless that party shows that some special damage or injury will accrue to some personal right, property or interest of his own, from the nuisance. For this reason, and to give the complainants the right to prosecute their complaint in this Court instead of a State Court, they allege that they have a special right to the personal use and enjoyment of the free navigation of the river under a license for the coasting trade, issued to them, respectively, under the authority of an Act of Congress, and that the bridge, if erected, will greatly interfere with, and limit, the use and enjoyment of such licenses. They also insist that the bridge will derange, interrupt and diminish, and do irreparable injury to the trade, commerce and business, connected with the navigation of the river, in which they are personally engaged. And one of them complains that the bridge will greatly and irretrievably impair the value of his real and personal property in Troy.

Having thus, as they suppose, established their personal right to complain of the proposed bridge as a public nuisance, they ask for the interposition of the Court to forbid its erection.

But several things are necessary to be established before the Court can interpose in the way demanded. It must appear:

That the proposed bridge will, if established, be a public nuisance;

That the allegations of special damage or injury to the complainants, as set forth by them, or that some of them, are such as this Court can take cognizance of;

That the right or interest, the injury to which is complained of, is a clear right or interest at law, in the complainants; and,

That that right or interest is of such a nature, and the injury of such a character, and extent or degree, that adequate redress could not be had in an action at law.

I have already shown, or endeavored to show, that the Court cannot take cognizance of any allegations of the complainants, to make them a substantive ground of judicial action, which consist of complaints that the erection of the proposed bridge threatens to impair the value of their real and personal property in Troy, and to injure their general business affairs and interests, carried on at that city, or elsewhere. Much less can the Court take such cognizance of any allegations of the complainants to the effect that the State had entered on a measure of mistaken public policy, which, instead of benefitting, would inflict injury on its own public interests, and on its own people, either generally, or in particular localities.

The general charge in the case is that of public nuisance by obstructing a public river—in other words, a charge that the defendant is about to do an act criminal in its nature, an act which would be an offence against the United States.

None of the allegations of private injury to the complainants, in this case, can be received, as putting them in a position to bring this charge of public nuisance against the proposed bridge, in the form of a Bill for an Injunction, except that which affirms their personal right, under the authority of an act of Congress, to the free navigation of the river. It is the right to the use and enjoyment of the license they set up, and of the free navigation of the river under it, which they insist would be directly interfered with by the proposed bridge, which gives them the right, if any they have, to complain of the bridge as a public nuisance.

It must be remembered that the only public nuisance of which this Court could take cognizance, in any form of action, information or complaint, is, a public nuisance, and a public offence, against the government of the United States. A nuisance and offence against a State govern-

ment is not within its cognizance. The proper mode, undoubtedly, of bringing before this Court a charge of nuisance committed, or threatened, against the United States, would be upon an Information, to which the Attorney General of the United States should be a party. (Opinion of Ch. J. Taney, in the Wheeling Bridge case, 19 Custis, p. 655.) The United States is the principal party in interest in the question of such nuisance, and ought to be heard, by its proper officer, before the question of nuisance, or no nuisance, should be decided. And the only ground on which a Court of Chancery will hear this charge of public nuisance from a private party (if it ought to or will hear it at all) is that of a direct, immediate and irreparable injury, actual or threatened, to the use and enjoyment of some right, property or interest of such party, and for the redress of which an action at law would be inadequate. Allegations of remote, contingent, incidental or speculative interests, will not be listened to. Besides, on a Bill in Equity in a Court of the United States, such private party could only be heard to complain of private injury to the use and enjoyment of some right, property or interest held and enjoyed under the Constitution or Laws of the United States.

In this case, the complainants must stand on the particular right claimed by them to the free navigation of the river, under the authority of their license from the United States, and the allegation that the use and enjoyment of such license and right will be directly interfered with, and injured, by the bridge, and nuisance, if permitted to be established.

On this state of the case, the question presents itself whether the particular private injury here set forth, if any should ever accrue from the erection of the bridge, is not one for which an adequate and complete redress could be had in an action at law. If it could, it is clear

upon the unquestioned doctrine of the law on the subject, that the complainants cannot be heard to bring this charge of nuisance against the bridge on this Bill in Equity for an Injunction. There is, besides, a statute of the United States forbidding the Courts to entertain a case in equity when a plain and adequate remedy in the case may be had at law. (1 Stats. at large, 73.)

Of the adequacy of the remedy at law in this case, there cannot be a doubt. Nobody pretends that the bridge is to shut up the river. The complainants will always be able to take their vessels through the draw. If they experience all the difficulty, delay and danger which their worst apprehensions anticipate, there will still be no difficulty in ascertaining their loss and damage in an action at law. The loss by delays, whether of minutes or days, and the loss from injuries to vessels or cargoes, by collisions with the bridge or otherwise, and any extra expense attending the passage, are all as easily ascertainable in dollars and cents, as damages in a thousand other cases constantly tried in our courts. The losses ascertained on one occasion would be a guide to the amount of the like losses on other occasions. And even the amount of damage sustained by depreciation in the value of the complainant's property, real or personal, in Troy, or by lessening the profits of their general business—if these remote and incidental effects of the bridge, supposing them to occur, could be made the subject of claims for damages at all—could be ascertained without any special difficulty.

The complainants cannot be heard in this case as the representatives of a class—those navigating the river under licenses for the coasting trade, for example; or as the representatives of the navigating interest generally on the Hudson; or as the representatives of Troy, West Troy and Green Island. They cannot be heard to ask

the Court to forbid the erection of the bridge, in the interest of the public, and because it will be a public nuisance. If the Court arrest the erection, it will not be to protect the public, or any portion of the public, from the bridge as a public nuisance. The government which represents the public, and is the guardian of its interests, is not before the Court, and has not complained of the bridge as a nuisance, or asked the Court for its interposition. Until it does so, the Court cannot volunteer to be the guardians of the public interests in this regard. The Court can only consider the question of public nuisance, or not, in the interest of the complainants, and not at all in the interest of the public, and if it puts its interdict on the bridge, it must be for the protection of the complainants, and for them alone. (Opinion of Ch. J. Taney, in Wheeling bridge case, 19 Custis, p. 655.) The question for the Court, in this view, is, whether the extraordinary protection which the complainants demand is indispensible in order to secure them in the enjoyment of rights and interests which, of themselves alone, are of such great magnitude, and such pressing importance, and at the same time are of such a character, that a remedy at law could not reach or cover them with any adequate redress. To propound such a question is to answer it.

The misfortune of this case, brought before the Court on a Bill for an Injunction, is, that if the Court grants the Injunction to protect the complainants, it forecloses the public, and the government of the United States as representing the public, on the question of the charge against the bridge as a public nuisance, without that public being allowed to be heard on that question, as it is entitled to be heard. The fact that the government of the United States, against which this offence of nuisance is committed, if it be a nuisance, has not complained, and

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does not complain of it, through its proper officer, should be taken to bear strongly against all present interference with it. The complainants have no right to ask the Court to interpose for their individual protection in a mode which, if their suit is successful, forecloses the public on the main issue in the case, without suit or a hearing on its part, while the law is open to them, by a plain remedy for full redress, whenever they are touched by any actual injury to their personal rights or interests from the establishing of the bridge. If not satisfied with their remedy at law, and if, moreover, they really think the bridge will be a public nuisance, and a public crime, and are really desirous that the public as well as themselves, shall be protected from it, let them apply to the Attorney General of the United States, the proper law officer of the government, to institute and prosecute proceedings in behalf of the the government, against the bridge. Then the issue would be fairly before the court. If the Attorney General can be persuaded that the General Government, by reason of anything in the Constitution, or in any legislation of Congress, commands in the waters of the Hudson, instead of the government of New York, in regard to what may, or may not, be deemed obstructions to the highway of that river, by works of public improvement and public accommodation, constructed under State authority; and if he can be persuaded that the proposed bridge will, if erected, be an unlawful obstruction, and a public nuisance and public crime, it will be his duty to proceed against it. In such a case, the Court would be relieved from all embarrassment, and all undue responsibility. The Wheeling bridge case is an example of the injustice which is done the Court, when it is asked to pronounce a bridge to be a public nuisance at the instance, and in the interest, of a private party, and when the public against which the offence bears, if there be any, is not consulted

or represented before the Court. In that case, the decision of the Court that the bridge must be deemed a public nuisance, was reversed by the very extraordinary mode of a public law, passed for this purpose, by the very government against which the alleged nuisance was supposed to have been committed.

This is not the case of a nuisance, if a nuisance at all, such as a private trespasser may commit by placing unlawful obstructions in the highway of a road or a river. Our bridge is to be erected under color, at least, of sovereign authority, and is not to be treated as a naked trespass, growing into an act of public criminality. A State may err in the exercise of its sovereignty, but it cannot commit a crime or a misdemeanor. This bridge is not a public offence against the State, or the public of the State. It is not a *purpresture* by the laws of the State. A *purpresture* is an unauthorized encroachment on the property or soil of the sovereign, in a highway, river or harbor. (Per Ch. Kent, in Attorney General v. Utica Insurance Company, 2 J. Ch. R., p. 381.) The soil of the Hudson river, out of all question, is the property of the State, and the State could not commit a *purpresture* on its own property. If it is a nuisance of this particular kind, called a *purpresture*, as against the government of the United States, then it is so because the United States owns, or is the sovereign over, the soil of the Hudson river, and not the State of New York, and because the bridge will be an unlawful obstruction to *their* river. If the United States do not own the soil of the Hudson river, then whatever else the bridge may be, it is not a nuisance of the kind called *purpresture*. It would be difficult to maintain that a State could commit a nuisance of any kind against the United States; but if, by reason of the supremacy of the National Government in particular things, the erection of this bridge, though

authorized by the State, would be an unlawful obstruction to a public river where that government commands, and hostile to the constitution and laws of that government, and, in this sense, something to be called a public nuisance; if this be all so, there is no reason why the Court should, but every reason why it should not, entertain a suit and motion to put down the supposed nuisance at the instance, and solely in the interest, of a private party, who has an adequate remedy at law for his private injury, if he sustains any. Certainly it would be safer to wait for the proper law officer of the government, whose business it is to take care of the public interests in this regard, if there be, or is likely to be, any such nuisance as is charged, to complain of the bridge, and ask the Court to apply the proper corrective.

VI.

The question whether the bridge in this case will, if erected, be a public nuisance, assuming now that the Court can and will entertain that question on these Bills of complaint, turns, of course, on the point whether it will create an unlawful obstruction to that free navigation of the river to which the public are supposed to be entitled, and which the complainants insist is secured to the public by the Constitution and the legislation of Congress.

Allowing then, to the Act for granting licenses for the Coasting trade, and to the licenses granted under it, all the authority and effect which can be claimed for them as conferring a personal right on all who hold them, to

the free navigation of the Hudson river, and of all the rivers and public waters of the United States, the question now to be considered is, will the proposed bridge, if erected as authorized and prescribed by the law of the State, so unlawfully obstruct the free navigation of the Hudson river as to amount to a public nuisance, and a public offence against the United States? I admit, in this connection, that whatever may be the right of the complainants under their licenses, the same right of free navigation belongs, or may belong, to the whole people of the United States. The question here presented necessarily involves the consideration of a supposed conflict between the authority and laws of the two governments, State and National.

Certain points of doctrine in regard to repugnancy and conflict, are deemed to be too well settled in this Court, to require that anything more should be done than to state them. The power of Congress "to regulate commerce with foreign nations, and among the several states," is an exclusive power; but the power is dormant until Congress legislates in execution of it. A measure adopted under State authority, and under an acknowledged power, which may affect commerce in some particular wherein Congress has the power to legislate but has not done so, would not be an unconstitutional act on the part of the State. To make repugnance or a conflict in such a case there must be something more than the mere delegation of the power over commerce to Congress; there must be Congressional legislation covering the subject. (Gibbons v. Ogden, 9 Wheat. R. 240, and Willson v. Blackbird Creek Marsh Co., 8 Curtis 105.)

There is no direct repugnance to the constitutional provision which clothes Congress with the power over commerce, in the measure which the legislation of the State has authorized in this case. If this legislation, however,

is so in conflict with any act of Congress passed to regulate commerce, that the legislation of both governments cannot stand, as a practical thing, but one or the other must give way, then that of the State must yield. This conflict of laws, if practically developed in an irreconcilable conflict of measures, or of rights, under such laws respectively, makes the State legislation inoperative under the provisions of the Constitution.

Now the complainants claim that Congress has legislated under its power to regulate commerce, in the Act which provides for the licensing of vessels for the Coasting trade, and that they are armed with the authority of licenses under that Act, and are thus entitled, as are all persons armed with the same authority, by the express legislation of Congress, to the free navigation of the Hudson. They add, that that right of free navigation extends up the river to Troy, because Congress has made Troy a port of delivery.

Taking the right then, as here stated, will the proposed bridge, if erected as authorized, so materially obstruct the navigation of the river that the reasonable right of the complainants, and others, to the free navigation, as claimed to be secured to them under their licenses, cannot be enjoyed, but will be unreasonably interrupted and injured by the effect of the bridge? Is there anything in the allegations and proofs before the Court to authorize it so to pronounce and declare?

The complainants do not, as I understand them, go the extravagant length of maintaining that their licenses give them an absolute and unrestricted right to enter the waters of New York free from any question, impediment, hindrance or delay, by or under the authority of the State; or to sail their vessels on the waters of the Hudson river, in the channels, or along the shores, wherever there was water enough to float them at the date of their licen-

ses, or at the date of the Act under which the licenses were granted, free from any obstruction, hindrance or difficulty of any kind, however slight, created by, or under the authority, of the State.

It is more than three-quarters of a century since the Act for granting licenses for the coasting trade was passed, and during all that time vessels licensed for that trade have been navigating the Hudson river. Within that period the State has done, or authorized, a great many things which have affected the navigation. Wharves and piers, carried far into the river from its original shores, have been constructed at New York, and Albany, and various other places. Nobody has ever complained of these, and they are not now complained of. Every one of these constructions is an encroachment, to a greater or less extent, on the free, natural flow of the river, and on the full freedom of navigation upon it in its natural state. Ferries are established across the river at various places under State authority. There are four steam ferry boats in almost constant motion at Albany. And every ferry boat on the river is in some degree an impediment to free navigation. A bridge exists at Troy, below the flow of the tide, which can only be passed by a narrow draw. A dam exists higher up, but still below the flow of the tide, which can only be passed by locks. All these are obstructions or impediments to free navigation, existing by State authority, and are not complained of. Throughout the United States, in all the navigable waters, the like obstructions and impediments have been created by State authority, and seldom, if ever, questioned. The State has a Quarantine establishment, standing guard perpetually over the entrance into its waters, and there foreign vessels, and vessels of the United States, both of the military and mercantile marine, are arrested and detained for hours, days or weeks, as a sanitary measure, at the plea-

sure of the State, and solely under State authority. If Mr. Frederick W. Coleman should come along with his coasting schooner, the Vintage, from Barnstable, in Massachusetts, and should come to this Quarantine ground with a pestilence on board, his vessel would be arrested until he could get permission from State authority to pursue his voyage up the Hudson river. Here is a liability to a more serious interruption to the perfectly free use of the navigable waters of the State, to a longer delay, and to heavier loss and damage, than any ever likely to arise from any bridge over the Hudson. But nobody doubts, the complainants do not doubt, the right of the State to interfere thus far, and in this manner, with the rights of free navigation, as claimed to be secured by the legislation of Congress, under the power to regulate commerce.

It cannot, then, be claimed by the complainants, that the rights of navigation in the Hudson river as secured to them by the legislation of Congress, and their licenses, are so absolute, that they are subject to no obstruction, impediment, delay, or restriction whatever, and no matter how inconsiderable, from the legislation and measures of the State. The legislation of Congress is paramount, and nothing in State legislation which directly and absolutely contravenes it, can stand. But much of the legislation of both governments may stand, notwithstanding a partial interference. The power to regulate commerce belongs to the General Government. That is one power. The power of police, under which quarantine and health laws are made, and the power to make roads and establish ferries and bridges, belong to the State. These are distinct and independent powers. They belonged to the State originally, when its sovereignty was absolute, and they were not taken away by the Constitution. If they are, in a certain sense and degree, subject to the power

of Congress over commerce, yet the original powers remain, and are still powers of sovereignty. When these independent powers are exercised by the respective governments, partial interferences and collisions are liable to arise in the measures they may authorise, or in the rights they may protect. But such partial interferences and collisions do not make the laws of the respective governments so absolutely incompatible and repugnant, that they cannot stand together. Wherever the laws of both can have a fair and reasonable operation and effect, both must be maintained. Without this principle, it would be impossible to maintain our complex system, impossible to make it operate in harmony, and secure the immense advantages which our daily experience shows us flow from the wise and beneficent adjustment of the powers of government in our State and National organizations. It has been the fixed policy of the country to maintain the principle to which I have referred. Congress adopts the pilot laws of the States, even while the power of the States to pass such laws is doubted. Congress passes laws to encourage and aid in the full execution of the quarantine and health laws of the States, though these laws materially interfere with that freedom of navigation which is supposed to be secured to all vessels sailing under its authority. (Ch. J. Marshall's opinion in Gibbons vs. Ogden.) Congress adopts the roads of the States for its post-roads, and for its military roads, though the power to make such roads for itself can hardly be doubted.

The question between the proposed bridge in our case, and the rights of free navigation supposed to be secured by the authority of Congress, must stand on this same principle and policy. Will the bridge be such an obstruction that the law of Congress in reference to licenses, giving it, in general terms, the construction which the complainants attribute to it, cannot have a fair and reasonable opera-

tion? Will it be such an obstruction that the rights of the complainants to the free navigation of the river, under licenses supposed to be intended to secure them from improper State interference, cannot be fairly and reasonably enjoyed? May not the bridge stand, as a measure of public improvement devised by the State, and all fair and reasonable rights of navigation still remain to the complainants and the public, substantially as claimed by them?

The river is not to be closed by the bridge; that cannot be pretended. The bridge is to be adapted to the position it is to occupy, with special reference to the preserving of open and unobstructed channels under and through it, for all the navigation that will have occasion to use them, or the river above. Eight-tenths of all that floats there will pass freely under the bridge at all stages of water. For the rest, it will have one draw of 180 feet in width, or two draws of 110 feet each. It requires no proof, it admits of no denial, that this provision is ample for the passage of the largest vessels navigating the river. It is a plain mathematical fact. The "Great Eastern" could pass through with ease, if there was water enough to float her. It is not a question whether the passage with the bridge will be as wide and ample as it is without it. It is not a question whether there may not, at times at least, be some little difficulty, some little inconvenience, some little detention, some little hazard even, in passing the bridge. Not only some little of all this, but a great deal of it all, is incident to the very nature of navigation, as well on rivers, as in bays and harbors, and on the open sea.

It seems clear that a vessel cannot move between Albany and Troy without encountering inconveniences quite as great as any to be met with in passing the pro-

posed bridge. Tows, as they are called, some acres of craft spread broad and long over the river, and dragging their slow length along, often to the great annoyance of other vessels and interests of navigation, may not be able to pass the bridge without some temporary diminution and lowering of their huge proportions and pretensions. If they cannot pass in grand column, they may easily break ranks a little, and so pass. They have to do this in other parts of the river. Grand armies have to do the like in all their marches. The river was not made for tows alone, of the Leviathan order. Such things were not dreamed of when the license law of Congress was passed. They are entitled to all due consideration, but not to any monopoly of rights or accommodation on the river.

The true question is, will the bridge, instead of closing the highway of the river, leave a liberal and ample gateway for every thing that floats there? If it will, then we say there is no real collision, no incompatibility between the bridge, as a beneficent measure of public improvement under the authority of the State, and the rights of free navigation, as supposed to be secured under the authority of Congress. The complainants and the public may still navigate the highway of the river freely, while a noble highway athwart the river, equally demaded for the use of the public, is also secured. To complain, or talk of such a measure as a public nuisance, seems to me to pervert language, and heap contempt on truth and reason.

What is "free" navigation? We have seen that those who claim free navigation, are still forced to submit to some abatement of the idea of an absolute and unrestricted scope and verge for the sailing of their craft. Freedom of navigation is a thing not difficult to be under-

stood. It is perfectly well defined in practice on European rivers, and the Publicists are not silent on the subject.

Vattel, when treating of the common right of navigating public rivers under the regulations of the sovereign, says:

"This right necessarily supposes that the river shall remain *free and navigable*, and therefore excludes every work that will *entirely* interrupt its navigation." (Vattel, Chitty's 7 Am. ed., pp. 123-4; B. I. sec. 273.)

The doctrine is that a river remains free and navigable, so long as its navigation is not *entirely* interrupted. Wharves and piers, and bridges with draws, do not entirely obstruct navigation, but leave the navigation open, and therefore free, in respect to physical obstructions.

When the navigation is thus left open, and is not embarrassed by oppressive duties and regulations, then it is free in the accepted European sense, and according to the doctrine of the Publicists. (1 Kent's Com., p. 35, 2d ed.)

In 1815, the European Powers, by the treaty of Paris, established the freedom of navigation on the Rhine, and made arrangements for extending the principle to other European rivers, which, like the Rhine, separated or traversed the territories of several States. The movement was made upon a Memoir of Baron William Von Humboldt, the Plenipotentiary of Prussia. A reference to the proceedings and papers will show that the freedom of navigation sought to be achieved, was the exemption from the various and vexatious commercial and custom-house regulations and impositions of the several riparian States, which had always greatly impeded navigation, and sometimes had shut up a river entirely. In the final act of the Congress of Vienna, it was declared that the navigation of these rivers should be "entirely free" ("*entière-*

ment libre") and could not, in respect to commerce, be interdicted ("*interdite*") to any body. (Wheat. Hist. Law of Nations, pp. 498—504.)

Minute provisions were made for the regulation of commerce, and the imposition of duties, by laws of common obligation among the riparian States, leaving to these States respectively their rights of sovereignty in all other respects. No stipulations were made, or suggested, to restrain the several riparian States from physical obstructions to the navigation by means of bridges, or other necessary erections. Bridges then existed, and more exist now, over these rivers—many of them to be passed only by means of draws. No necessity was felt for any special provision on this subject. Besides that no apprehension could be entertained that any riparian State would wholly shut up the navigation and commerce of its own river by physical obstructions—which must always be an act of suicidal folly—the law of nations provided for the case, if it should ever occur. The impediment to navigation which constituted the whole danger and the whole evil, was the various and conflicting regulations, duties, and exactions which the several riparian States were at liberty to, and did, impose on the commerce and navigation of the rivers which were common to these States. When commerce and navigation were regulated by a law of common obligation to them all, then the navigation was "entirely free." It was assumed that the navigation would remain *open*, because, by the law of nations, no State could establish a work, be it a bridge or any other, which, in the language of Vattel, would "entirely interrupt navigation." Every riparian State would take care to leave the navigation open at least to its own citizens, and just as it was open to them, would it be open to the citizens of the other riparian States. A navigation thus

open, and at the same time relieved from the impositions and exactions of particular States, and placed under a common law of commercial regulation, was an entirely "free" navigation in public law, and in common sense.

It is manifest that what was thus accomplished—after all, not in the most perfect manner—by the powers of Europe in 1815, in establishing freedom of navigation on their rivers, had been done in the most perfect and complete way, by the Constitution of the United States in 1787, in establishing freedom of navigation on all the navigable waters of the United States.

Before the Constitution, the same evils of separate and rival commercial regulations among the several States in this country had existed, as afflicted navigation and commerce on the European rivers, and it was exactly these evils that were sought to be, and were, effectually corrected and remedied by the provisions of the constitution. When the separate States had been forbidden to lay duties on imports or exports, or duties of tonnage, and the general regulation of commerce was confided to a common government, which all the States were bound to obey, and when, in addition to all this, it was provided that no State could give privileges and immunities to its own citizens to which the citizens of other States were not also entitled; when all this was done, freedom of navigation on all the navigable waters of the United States, was effectually and abundantly provided for. If, as the complainants here maintain, it belonged to Congress as a part of the power to regulate commerce, to provide by legislation against improper physical obstructions to navigation by the erection of wharves, piers, or bridges, under State authority or otherwise, and if Congress, as they maintain, has made that provision by its legislation in regard to licenses for the coasting trade, still the question remains, in respect to erections, made under State authority, in or

over a navigable river, and which produce physical impediments to the navigation—when do they, and when do they not, leave the navigation open and free, in a proper and just legal signification? I know of no legal definition which the Court can apply to the subject but that which is derived from the law and the practice of nations. There can be no other safe rule. The law of free navigation in regard to physical obstructions in the rivers of the United States, created under State authority, still subject as such rivers are, confessedly, to the general sovereignty and jurisdiction of the several States within which they run, cannot be any other than that of the established law of nations. No other rule is adapted to the case. The Constitution provides no new rule on the subject; Congress has prescribed none; and surely this Court cannot make one.

The rule of the law of nations, in regard to physical obstructions, as I understand it, is, that if the navigation be left open to all who are entitled to use it, as it is to the citizens of the State making the erections, the navigation is free. If, for example, a low bridge is erected over a river by the sovereign entitled to make the erection, and the navigation is left fairly open by means of a draw, the navigation is free from any unlawful physical obstruction.

What constitutes then the full freedom of navigation of a river in this country, as all over the world, is, 1st, such freedom from physical obstruction as shall leave the navigation fairly open—as by a proper draw in a bridge; and next, freedom from such special legislation, exactions, impositions and regulations as separate riparian States might impose, and the subjection of the commerce and navigation to a common law of regulation, which all are bound to observe, so that all who are entitled to use the highway of the river enjoy equal rights and equal privileges in the navigation. This is what I understand constitutes in full,

in all its length and breadth, that free navigation of the Hudson to which the complainants, and the public, are entitled.

It is the physical obstruction to the navigation which is complained of in this case. And the position I take on that point, is that, inasmuch as the proposed bridge will be constructed with a draw, or draws, which will leave the navigation open to all who are entitled to use it, the navigation is perfectly "free," in the legal acceptation of the term as applicable to all public rivers, and free, too, in the whole common sense of the subject.

It is sufficient if the navigation is left "open;" and nobody has a right to complain of any necessary restrictions which may attend this new condition of the navigation. Good faith requires that it should be left *fairly* open—a condition abundantly secured by the interest which the State itself has in a free navigation. In this case, there cannot be a doubt that the navigation is to be left, not only open, but fairly and liberally open, and in that sense, the only sense in which the complainants or the public have a right to demand it, entirely free.

I am glad to believe that the view I have now presented, of what free navigation is, in respect to physical obstructions authorized by State authority, is in perfect harmony with the opinions and decisions of the Courts of the United States, in all cases where complaints have been made before them against bridges over public rivers.

In the Cuyahoga Bridge Case, (3 McLean, R. 226,) Mr. Justice McLean said: "A dam may be thrown over the river provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge." He said also in the same case: "A draw-bridge across a navigable river is not an obstruction."

The decision of the same learned judge in the Rock Island Bridge case, so far as he considered the question

of obstruction, and the open navigation furnished by the draw, was in accordance with his opinion in the case just referred to.

In the Wheeling Bridge case, the majority of the Court held the bridge to be an unlawful obstruction, because it was an absolute impediment, because, in fact, in their judgment, it shut up the river at that point, to a certain class of vessels accustomed to use it—the class of steamers with tall chimneys. It was not provided with a draw. And Mr. Justice McLean, who delivered the opinion of the Court, said: "If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels." In the dissenting opinion in this case, of his Hon. the Chief Justice, it was wisely said, quite in accordance with the opinion just quoted: "Bridges have been erected over many navigable rivers, and built so near the water, that vessels can pass only through a draw. Such bridges are unquestionably obstructions, and impede navigation. For where the vessels are propelled by sails, and the wind is unfavorable, they are often detained not only for hours, but for days. The Courts of the United States have never exercised jurisdiction over any of these obstructions, nor declared them to be nuisances." It is only necessary to add in reference to this case, that the decree for abatement which had originally been made, was subsequently modified by the Court so as to authorize a draw to be constructed, such as, in the opinion of an engineer to whom the matter had been referred, would fairly open the navigation to the class of vessels to which otherwise the bridge was held to oppose an absolute obstruction. Such a draw was declared to be satisfactory, though vessels would be obliged to leave the

principal and accustomed channel, and run an increased distance by another, to reach the draw.

These cases I think show a sufficient harmony with the doctrine which I have brought to the notice of the Court, with regard to physical obstructions under State authority in a navigable river. By this doctrine, when, as in this case, the Court sees that the State has made careful provision, by means of a draw in its proposed bridge, to keep the navigation fairly open, I think it is bound to assume that the draw will be sufficient for that purpose until at least the contrary is made to appear by practical demonstration after the erection is made. This I humbly think is the only convenient, the only safe, and the only legal course for the Court. But, at any rate, if the Court will entertain the question, and hear proofs in regard to the sufficiency of the draw before the erection is made, on a Bill in Equity by a private party, at least it should insist that the case against the sufficiency of the draw shall be made out with a certainty which shall leave nothing to doubt about.

The proposed bridge with a draw, authorized by the State, is *prima facie* a lawful bridge. It is not an obstruction by the test of the only rule of law which can be applied to the subject; it leaves the navigation fairly open and free. The opening will be ample, and the arrangements ample, to admit the easy passage of any vessel navigating the river. There will be a very wide draw, and comparatively a very narrow vessel to pass it. No testimony could impeach that broad fact. And with this fact alone I insist that the bridge is a lawful one. If delays and difficulties may occur, still they cannot impeach the lawfulness of the bridge, unless they are shown to be such as must amount to a practical impediment to the passing of the draw, so great that parties

engaged in the navigation would be likely to abandon it as no longer free. No such difficulties or delays have been shown; none such can be shown in the nature of the case. The navigation will be fairly open, and therefore free—free in the sense of international law—free in any sense of the license law of Congress, which can be fairly attributed to it—free in the sense of the licenses granted under that law, even when taken, after the construction of the complainants, as a warrant of title in all who use them to the free navigation of the river.

VII.

But I come now to look at the case in another view. I hope I have shown that the proposed bridge will not be an unlawful erection and a nuisance, even if it be admitted that Congress, in the shape and guise of a regulation of commerce in respect to the coasting trade, has actually passed an Act, the object of which was to prevent and prohibit improper and undue obstructions by bridges, or other erections, in navigable rivers, and to control State legislation in relation to such erections. But I must now deny that Congress passed the Act for licensing vessels for the coasting trade, or that it has ever passed any Act, with the object and purpose thus attributed to it. I deny that there is any legislation of Congress of any kind, that purports to have any such object in view, or that can bear any such interpretation without an utter perversion of all the canons of interpretation usually applied to statutes.

In the Wheeling Bridge Case, certain general legislation of Congress for the regulation of commerce on all

the navigable waters of the United States, in "licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, &c.," and also the sanction by Congress of the compact between Virginia and Kentucky, for the free navigation of the Ohio, were referred to by the Court as sufficient to warrant the Court in declaring the bridge as built, to be an obstruction, and a public nuisance.

But the Court can only administer the laws of the United States, not make them, or supply any defects in them. The question is, has Congress declared a bridge over a public river, or any erection of the sort, producing an impediment to navigation, to be an obstruction, and a public nuisance. If it has, the Court may administer that law by so pronouncing; if it has not, there is no law on the subject for the Court to administer.

Nothing, it seems to me, can be clearer than that Congress has adopted no system of legislation, and no Act of legislation, to prohibit or prevent obstructions in navigable waters. It has adopted no legislation which indicates any such object. No Act could have ever have been passed for such a purpose without eliciting debate, or without arousing attention, and, I may add, without the strongest opposition. There cannot be a doubt that the States are perfectly competent, and always perfectly ready, to prevent and punish any unauthorized obstructions in the navigable waters within their respective limits. As for the States themselves obstructing their own navigable waters, in any way to be a fit subject of complaint by their own citizens, by other States, or the citizens of other States, they no more need the guardianship of Congress, or of the Courts of the United States, to prevent such mischief, than they do to restrain them from breaking up their roads and railways, and filling up their canals, or setting fire to their own capitals, or burning up their own

commercial cities. If Congress had ever legislated on such a subject as this, everybody would know it; the legislation would be plain and palpable, and the Courts would not have been left to grope in the dark after the law.

The laws passed by Congress for the regulation of commerce are in no sense laws to prohibit or prevent obstructions to navigable waters. They do not express, or indicate, any such purpose, and they are, in no particular or degree, adapted to meet and cover such an object. They are general regulations, attending vessels wherever they go on the navigable waters of the United States, and into whatever ports they enter.

A license for the coasting trade is an authority to a vessel to visit any waters of the United States which it may find open and navigable, and any port of entry or delivery, or any port not one of entry or delivery, which it may find accessible. But it is no pledge to the owner or navigator of the vessel, to go before him to clear away any obstructions he may meet with. The act for granting licenses is not an act to prohibit or prevent obstructions, or to declare an obstruction a public nuisance, and make provisions for the proper abatement and punishment of such a public offence.

It seems to me there was still less in the compact between Virginia and Kentucky, and the sanction of it by Congress (if it was so sanctioned,) which could be construed, or tortured even, into a law of Congress to prohibit obstructions in the Ohio, and declare them a public nuisance.

Under the Constitution, all the navigable rivers of the United States, those in the west as well as others, are free rivers to all the citizens of the United States. The compact in the Ordinance of 1787, which was before the Con-

stitution, and the compact between Virginia and Kentucky, do not make the western rivers more free than the Constitution makes them, by various special provisions in relation to duties, navigation and commerce, and by declaring that the privileges and immunities of the citizens of each State shall be common to the citizens of all the States. All highways, whether of water or on land, which are common to the public of a State, are common to the public of the United States. The easement of a navigable river is for the use and enjoyment of the whole people. The whole design of the compacts referred to was to secure this very advantage, which is now so effectually secured everywhere by the Constitution. The whole object was, not to prevent physical obstructions in a river by the authority of a State, which no State could make or authorize without doing itself and its own citizens more harm than anybody else, but that the citizens of other States should be put on an exact equality with the citizens of the State within which a river might run, in regard to the use and enjoyment of the easement of such river. (Opinion of Ch. J. Taney in Wheeling Bridge case, 19 Curtis, p. 649.) The Constitution now secures this object perfectly. No State within which a navigable river runs, can impose any burthens, any disabilities, any restrictions or conditions upon the vessels or citizens of other states in using the easement of that river, that are not equally imposed upon the vessels and citizens of that State. Any State legislation in violation of this rule, would be repugnant to the Constitution, and the remedy and correction could be easily applied.

All the regulations of commerce by Congress are framed with a steady regard to exactly this state of things. They are general rules, and generally of universal application. They secure the perfect equality of all vessels, and of all

citizens of whatsoever States, on the navigable rivers of every State. A coasting license secures exactly this equality, and that is all it secures. It certifies to its possessor, if a citizen of another State, a perfect equality of rights in the navigation of any river, which that river affords, under the sovereignty and jurisdiction of the State in which it runs, to the citizens of that State. Beyond that it has no meaning, and no force, in respect to freedom of navigation. Congress has been content thus far, and I believe it will always be content, to leave the sovereignty and jurisdiction of the several States, and the general police of their own rivers, in regard to obstructions therein, untouched and unrestricted. And to construe the Act providing for coasting licenses, or Acts establishing ports of entry or delivery, as laws assuming Federal jurisdiction over all navigable rivers, and as enactments to prohibit obstructions and declare them a public nuisance; this I must hold to be a perversion of the plain intent and meaning of statute law, such as has no parallel with which I am acquainted.

I do not see why the decision in the case of the Blackbird Creek Marsh Company, does not entirely cover the position that Congress has passed no law the object of which has been to control State legislation in regard to bridges and other erections in navigable waters. There a close dam had been made across a navigable creek by State authority. And in a suit which involved the consideration of all the authority that could be given to a license for the Coasting trade, the Court held that Congress had not legislated in a way to control the State in this act of sovereign power.

VIII.

I have one other view of this case to present to the Court. I have considered the case on the assumption that Congress has legislated in a manner, and with the intent, to control State legislation on the subject of erections in, or over, the navigable waters of the United States. I have next shown, or endeavored to show, that Congress has not legislated with any such intent, or to any such effect. I come now, finally, to a question which lies entirely back of these, and of all other questions in the case—a question fairly arising in the case, one which it is quite time this Court should consider and decide; and the decision of which, in accordance with the view which I entertain of it, would not only dispose of the whole issue between these parties, whatever might be the opinion of the Court on the other points raised and discussed in the suit, but would settle and quiet forever the whole disturbing subject, now so fruitful of litigation, of a supposed conflict between the National and State governments in regard to an important branch of sovereignty and jurisdiction over the waters of the United States.

The question which I have to present and discuss, is this: Has Congress, under the power "to regulate commerce with foreign nations, and among the several States," authority to pass laws to prohibit, or to remove, what it may deem obstructions to navigation, in the navigable waters of the United States, by erections therein, under State authority, exercised within the territorial limits of the States respectively; or to prescribe terms and conditions on which such erections may be made, or to regulate the same; and by such Congressional legislation to control or restrict State legislation on the subject.

In other words, the question is, may the National Government, by its legislation under the commercial

power, oust the States of their sovereignty and jurisdiction over the navigable waters within their limits respectively, and itself assume jurisdiction so far as to command exclusively, in and over the same, and over the soil under the waters, in whatsoever may concern or affect the easement or freedom of navigation therein, due to the public; exercising all the powers of sovereignty over all the navigable waters of the United States, and over the land under these waters, which any sovereign can exercise over the navigable waters, and the land under them, within his own dominions?

I am perfectly aware that the power of Congress, which I here propose to dispute, has generally been assumed and taken for granted, in the Courts of the United States, without question or discussion. It has, however, only been assumed in the *dicta* of the Courts in delivering opinions. No case, so far as I am aware, can be deemed to have been made to turn or stand on this assumed power, possibly with the exception of the Wheeling Bridge Case; and there the question was not raised and discussed at the bar, or considered and decided by the Court. The power was merely assumed, and thus alluded to in argument. I hope, under all the circumstances, and considering the immense importance of the question, the Court will not think we are too late in raising that question now, and asking for a solemn decision upon it.

All navigable waters within the State, such as the common law calls navigable, are a part of the domain of the States in which they lie. A State owns the soil and bed of its navigable waters as far as the tide flows. Its jurisdiction over them is that of a sovereign. Its civil power over them is that of a sovereign. Navigable waters, within the dominions of a sovereign, are the property of the sovereign; the public, however, under the sovereign, has a right to the easement upon them for navigation.

But the sovereign may make grants therein, interfering in some measure, with the navigation,—as for fisheries and the like. The sovereign may even close the navigation for strong reasons of State ; as for sanitary purposes, or where public policy demands it. The case of the Blackbird Creek Marsh Company is an example. The right of the public to navigate a navigable river, is perfect as against all private and unauthorized obstructions. But the sovereign may, for reasons of State, create impediments to the navigation, and no subject or citizen has a right to complain of it, or can bring any action for injury to the rights of navigation, or injuries to property affected thereby. It is presumed the sovereign has good reason for the measures he may adopt, and if remote incidental damages follow from them, the citizen has no remedy but by petition to the sovereign. If the sovereign takes away his property by any public act, he must make compensation for it. These are general and familiar principles which need only to be stated to the Court, to receive its full recognition.

All this sovereignty and right belonged to every State in reference to its navigable waters, before the Constitution. The sovereignty was not taken away by any express provision in the Constitution, and transferred to the National Government. That Government is not declared to be the sovereign of any part of the proper domain of a State, whether it is land or water, or land under water.

It is true, Congress is clothed with power to regulate commerce, and it becomes a material question, how far Congress, by its legislation under this power, may control State legislation in the exercise of that sovereignty I have just been describing. The conferring of such a power does not take the sovereignty and domain from the State, and bestow it on the National Government. It does not

affect the sovereignty until some legislation takes place in execution of the power; and what Congress may do, and what it may not do, in execution of this power, we must endeavor to ascertain and define. If it had been intended to transfer State sovereignty, over all the territory of the States covered by navigable waters, constituting so large a part of their domain, to the National Government, it would have been done with at least as much formality and explicitness as was observed in conferring exclusive government upon Congress, over the seat of the National Government, and over the places where its forts and other needful buildings are established.

I have already had occasion to show that the grant of Admiralty and Maritime jurisdiction does not affect the proper sovereignty of the State. It does not carry a cession of the waters, where these cases may arise, or the general jurisdiction over them.

It does not admit of a doubt, as I suppose, that the sovereignty and general jurisdiction over the navigable waters, within the boundaries of a State, remain with the State. The question then arises, how far may the legislation of the State, in execution of this sovereignty and general jurisdiction, be controlled by the legislation of Congress under the power to regulate commerce? Does this power authorize Congress to assume that sovereignty over the territory covered by the navigable waters of a State, which the National Government must exercise, exclusive of the State, if it is to command in and over the waters, in whatsoever may affect the condition, for practical use, of the easement therein, to which the public are entitled?

The power to regulate commerce is exclusive, to whatever extent it may be rightfully exercised by Congress. No State can exercise it, or any part of it. Whatever is, or may be a regulation of commerce, must be effected by

National legislation. And commerce includes navigation and intercourse. It is not confined to water, and places accessible by water. It passes inland, and moves on the soil, and inland waters, among the States. The power of Congress attends foreign and inter-state commerce, wherever it goes, for all necessary purposes of legal regulation; and this power is the same on the land as on the water. Whatever Congress may do in control of State legislation and State sovereignty on the navigable waters within a State, it may do on the land, wherever routes of foreign or inter-state commerce are, or may be established.

The history of commerce under the Confederation, reveals very clearly the mischiefs of independent State regulation, which were intended to be remedied by making the general commerce of the country national, and making one government responsible for its regulation. Commercial treaties could not be made or maintained, without this national power over foreign commerce. Without it, the foreign commerce and navigation of the country were under the sway of foreign powers. The whole navigating interest of the United States was liable to be sacrificed to the foreign navigating interest engaged in American commerce. Even that engaged in the coasting trade, and in the fisheries, was liable to the same disability and sacrifice, and hence the necessity of making the national power over commerce cover the trade between the States, a necessity made imperative by the interested, oppressive, and retaliatory legislation, between individual States, or classes of States, affecting most injuriously, not only the foreign and coastwise trade, but the internal trade between the States.

Much of the original mischief was directly met and prevented, by specific provisions in the Constitution. Congress cannot tax the exports from any State; nor abuse its power by giving the ports of one State preference

over those of another; or by requiring vessels bound to or from one State to enter, clear or pay duties, in another; or by laying any duties, imposts, or excises, but such as are uniform throughout the United States. And an effectual restriction is laid upon the States to prevent their laying duties on imports or exports, or duties of tonnage. Nor can a State confer any privileges or immunities in respect to commerce within the State, on its citizens, which will not equally belong to the citizens of other States.

For the rest, the regulation of commerce is left to the legislation of Congress. By the legislation of Congress, an American commercial marine is established, and a national character impressed upon the vessels and crews engaged in commerce; the shipping interest in the foreign trade is protected against injurious foreign legislation, or decrees; the coasting trade is secured to the home interest in shipping and navigation; convenient ports of entry and delivery are established, and custom house officers appointed to conduct the necessary business at such ports; vessels engaged in commerce are furnished with papers which fix their character and privileges, and coasting vessels receive a license from year to year, which is their warrant and authority to pass from port to port, wherever they find ports accessible, and to navigate the waters of the United States, wherever they find the waters navigable.

We all know that in the original movements, which resulted in establishing a new government, commerce was the chief thing considered. In the instructions to most of the delegates who met at Annapolis, the main thing required was, to enquire how far a *uniform system* in the commercial intercourse and regulations of the United States was necessary.

In the Constitutional Convention, in committee of the whole, on the several plans for forming a new government, the rule adopted as to specific powers to be given to Congress, was, that it should legislate in those cases "to which the States were separately incompetent, or in which the harmony of the States would be interrupted by the exercise of individual legislation." This rule applies to this commercial power as conferred by the Constitution. All the legislation of Congress which comes properly and directly under the head of this power, will be found to have had a general reference to the rule which confines such legislation to doing what the States are separately incompetent to do, or what, if attempted by them, would interrupt their harmony.

Without touching the question of disputed right, whether Congress has, or has not, authority to protect and encourage domestic industry, under the power to regulate commerce, I may remark, that the form of affecting the object, whenever duties have been laid *primarily* for protection, is strictly one of commercial regulation; that as a commercial regulation it is one to which the separate States are clearly incompetent, and one in which, if attempted, (as certainly it could not be) the harmony of the States would be necessarily interrupted by individual legislation.

But Congress has done many things, and the authority of Congress to do many other things is often claimed, which have some manifest relation to commerce; and the question is, where does Congress get the power to do them? Congress establishes and maintains light-houses, buoys, beacons and breakwaters, and has at times engaged in removing natural obstructions from bays, sounds and rivers. It has prosecuted for a series of years, and still prosecutes, at great cost, that most beneficent and magnifi-

cent work, the Coast Survey. Under what power is all this done? Not, certainly, as a direct exercise of the power to regulate commerce. A light-house, a buoy, or a breakwater is certainly not a regulation of commerce. Nor is the removal of a rock, or a sand bar, in navigable waters, a regulation of commerce. They aid commerce, but do not regulate it. They are a means of facilitating and carrying on commerce. But Congress has no direct authority to carry on commerce, or to supply the means of carrying it on, but only to regulate it as carried on. Nor can these measures properly come under the "incidental" power—that of making laws "for carrying into execution" the power to regulate commerce. They are not means "necessary and proper" for carrying any regulation of commerce into execution. They are not adapted to such an object. A regulation for the government of seamen on board of American ships; for conferring privileges on ships built and owned in the United States; for laying discriminating or countervailing duties; for granting licenses for the coasting trade or fisheries; such regulations of commerce are not carried, or aided in being carried, into execution by any of the measures just referred to. They may, and do, tend to protect, increase, multiply and facilitate commerce as and where it is carried on; but the execution of every act of commercial regulation is just as perfect without as with them.

If these measures are to be justified under any "incidental" power, it is rather under that of making laws for carrying into execution the power of Congress to lay and collect duties on imports; that is, the taxing power. As Congress is authorized to raise revenue by duties on imports, it might, with plausibility at least, be argued that to carry into execution this power in a way to produce the required revenue at the least burthen, it is

necessary and proper that measures should be adopted to increase, multiply, facilitate and protect commerce in all practicable ways, and that these measures are fitted and adapted to that object.

But the true constitutional ground on which these measures stand, is that of the direct and substantive power of Congress to make appropriations for such objects, of a national character, as are "for the common defence and the general welfare of the United States." This is taking the most natural and safe construction of this power, namely, that it is a power of taxation, but limited to objects and uses of a national character. The power to lay taxes, taken as an independent power, and subject to no restriction, would have been absolute and arbitrary, and Congress might have raised revenue and applied it to any purpose it might choose. But when the objects of raising revenue are especially limited to those of "paying the debts, and providing for the common defence and general welfare of the United States," taxation is limited and restrained, and the proceeds can only be applied to purposes of a *general and national* character within the purview of the Constitution. (Story's Com. Ch. 14.)

On no other just ground than this, can appropriations to make, or aid in making, internal improvements in roads, harbors, and rivers rest. Appropriations for light-houses, buoys, and breakwaters, for the Coast Survey, and for all the indispensable aids to the national commerce, rest properly, on the same firm foundation. I am not of the number of those who deny the power of Congress to appropriate money for the improvement of harbors and rivers. I think it has not done half as much of this sort of work as it ought to have done. But I do not find the authority for it in the commercial power. Whenever such an improvement is national in its character, object,

and importance, appropriations for it have an abundant warrant in that direct power which I have named. It is under this power, and not the commercial power, that Congress formerly made appropriations for the improvement of the navigation of the Hudson river above and below Albany; and I think the general interests of commerce, and of the country, would have been greatly advanced if that policy had been duly prosecuted, instead of being virtually abandoned, as it was many years ago.

Here then, as I venture to think, is the legitimate and true constitutional ground on which appropriations for the class of objects just referred to rest, and the question before the Court is not embarrassed by any necessity of assuming, or supposing, that they have been made, and could only be made, under the power to regulate commerce, or the power *incident* thereto, as being "necessary and proper" to carry that power into execution.

There is nothing in the action of Congress authorizing these measures; nothing in their history; nothing in the Constitution, requiring or, as I think, authorizing the Court to set them down to the account of the commercial power.

There is nothing in the Constitution which places the jurisdiction of the waters of a State, in regard to the easement of the public therein for navigation, in the hands of the National Government, any more than it places the jurisdiction of the land, and soil of the State, in the same hands, in regard to the easement of the common roads and highways in it, when they are routes and highways of foreign or inter-state commerce. So far as the waters are navigable, and the easement remains dedicated to the use of the people of the State, they are equally open and free to the citizens of all the other States; and just in the same manner, the roads of the State are open and free to the use of all, because "the citizens of each State shall

be entitled to all the privileges and immunities of citizens in the several States."

In all this respect, there is no difference between the land and the water. The roads, railways and canals of a State are no more under the sovereignty and jurisdiction of the State, than are its navigable waters; and State legislation over the navigable waters of the State, in respect to their condition as highways of general commerce, is no more subject to be controlled by the paramount legislation of Congress, than is State legislation over its roads, railways and canals, where they are highways of the like commerce.

If the power to regulate commerce, or the power incident thereto, authorizes Congress by its legislation, to establish the supremacy of the National Government over the waters of a State, in all that concerns or affects their navigableness, it authorizes Congress also, and equally, to establish its supremacy over the main avenues and routes, in and through the land of the State, so far as they are, or can be made, the channels or highways of foreign com merce, or commerce between State and State. If Congress has authority, by the commercial power, to take the Hudson river under its sovereignty and jurisdiction, because it is a highway of commerce between the States, and can forbid any erections to be placed therein, by State authority, or any but such as Congress shall prescribe, it has the same authority to construct a road, a railway, or a canal through the State, between the Hudson river and Canada on the north, or Lake Erie and the States bordering thereon, and still further on in the west, and to exercise sovereignty and jurisdiction over such road, railway or canal, as highways of commerce, and forbid all erections in or over them by State authority, or all but such as itself shall prescribe. This precise power has been

claimed for Congress as a commercial power. (Story's Com. Ab., p. 454, sec. 633 ; orig. sec. 1269)

According to this doctrine, Congress itself might have made the Erie and Champlain canals, as highways of foreign commerce, and commerce between State and State, with ports of entry or delivery at the termini; artificial rivers, the jurisdiction and control of which, for all the uses of commerce, would have belonged to the National government, with authority to keep the hands of the State government off from them, allowing no erections in or over them, not even a bridge, out of the many hundreds now thrown over them, but such as Congress might allow and prescribe. On the same principle Congress might have constructed the trunk or main lines of our railways, leading from the great commercial center of the State, to their northern and western connections with a foreign country, and with other States, and might have controlled them, as highways of commerce, against all interference of State authority.

Congress might go further. The railways and canals of New York, are as much highways of commerce, for foreign trade, and that between States, as the Hudson river, or any other river, or water in the whole Union. The trade between the United States and Canada through these channels, amounts to many millions annually ; and that between the States to many times as many millions more. If Congress, under the commercial power, has a right to command in the channels and highways of foreign and inter-State commerce, for the protection of such commerce, by its paramount authority, as against State interference or control in the matter of physical obstructions,—then on principle, there is no reason why the National Government should not assume the sovereign command on the railways and canals of New York, constructed by the State, as well as on the Hudson river, for

the protection of the foreign and inter-state commerce therein, against State interference. It might legislate not only to make regulations for this commerce, by establishing ports of entry or delivery, along the line and at the termini of these routes, and by granting licenses of passage and navigation as in the coasting trade, but to prescribe and control the construction of all locks and bridges on the canals, and of all the viaducts and crossings of the railways, and of their gauge and grades. The right of the State to take tolls and fares, in consideration of the cost of these works, would probably be respected.

The internal commerce of the country is many times greater than the foreign commerce; and that part of it which is properly foreign and inter-state commerce, taking carriage and travel together, moving on the land, by way of the roads, railways and canals, can hardly be less than that moving on the rivers of the United States. If it is necessary and proper that Congress should assume the paramount jurisdiction over these rivers, so far as to control and direct all erections in or over them, and whatever else might affect their navigableness, it would seem to be equally necessary and proper that it should extend the like paramount jurisdiction over the land, so far as to control and direct all structures in or over the roads, railways and canals, used for foreign and inter-state commerce, and whatever else might affect their availability or utility, as the highways of such commerce. It would not be easy, I think, to find one reason, founded in principle, necessity, or propriety, and having reference to the power to regulate commerce, why Congress should exercise that sort of paramount jurisdiction which I have described, over the navigable waters of the several States, which does not equally require and demand, that it should exercise the same kind of jurisdiction over the land, wherever

great routes for foreign and inter-state commerce are, or may be established.

The fact that some of these waters of the States, flow into the ocean, and that the ocean flows into them by its tides, or the fact that some of them flow through, or between two or more States, cannot affect the general doctrine respecting this jurisdiction. The Constitution leaves these waters where it leaves the land, under the general sovereignty of the States. If in giving to Congress the power to regulate commerce, it authorizes that body to assume this particular jurisdiction over the waters, it must give it the same jurisdiction over the highways of general commerce on the land, for precisely the same object and under the same necessity. There is nothing in the nature of the power, or in the nature of the subject, to mark a distinction between the two cases. All that can be said about it is, that it might be a little less difficult for Congress to assert this jurisdiction on the waters than on the land.

The fact that these waters are natural highways, while roads, railways and canals, are highways of artificial construction, cannot affect the question before us. It is a question of sovereignty and jurisdiction, to be exercised for a specific object,—that of protecting commerce whereever it moves, on the water or on the land. If this is a necessary jurisdiction in the general government, on the water, it is necessary also on the land. If it is necessary in order to keep open and free, highways of commerce on the water, as against State interference, it is equally necessary, in order to keep open and free, highways of commerce on the land, as against State interference. The same motive, and the same interest, if any such can be conceived, which would lead a State to obstruct commerce on the waters under its jurisdiction, would lead

it to obstruct commerce on the land. There can be no doubt, I suppose, that, before the Constitution, any State might have shut up its navigable rivers, flowing wholly within its own limits, from the use of the citizens of other States, or admitted them on its own terms. It cannot now do this, except by closing them to its own citizens; an authority which it is safe to say can never be exercised over a river of any public importance. This authority does not differ in kind, and hardly in degree, from that which a State exercises over its roads, railways, and canals. They are highways for public use, subject to the general sovereignty of the State.

The change which the Constitution wrought in respect to navigable waters, was: First, that the navigable waters of every State, should be as free to the citizens of all other States, as to its own;—and next, that so far as they should remain free and open to its own citizens, being free and open to all the citizens of the United States, the navigation and commerce upon them (ex cept that which might be purely domestic to the State) should be subject to the regulation of Congress. The Constitution wrougth the same change on the land. The highways of a State must be as free to the citizens of other States as to its own; and so far as they are free and open to its own citizens, being also free and open to all other citizens of the United States, whatever of foreign or inter-State commerce moves upon them, is subject to the regulation of Congress. In both cases, and equally, the sovereignty and jurisdiction otherwise remain with the State. It was no part of the purpose of the Constitution, under the power to regulate commerce, to clothe Congress with authority to assume the sovereignty over the channels and highways of commerce, within the several States, whether by water or land, to the exclusion of the States, in respect to what-

ever might concern or affect their condition and availability for the uses of commerce. That was a matter which belonged to the States, and was properly left to their control. It devolved on the General government to give uniformity and freedom to commerce, by its regulations, wherever that commerce, under individual enterprise and conduct, should find open and free highways for itself among the States, whether on the water or on the land, leaving those highways, and all that might affect their condition and availability as such, to the jurisdiction, control and care of the States.

The channels and highways of commerce in the States, wherever open, being made free to all the citizens of the United States, by express provisions of the Constitution, it remained only to make the commerce itself free—free from all partial and conflicting legislation of the States—and to give it a national character by such uniform regulations as Congress alone could make.

Happily, we have now the experience of seventy years to show the wisdom of this arrangement. The States have exercised this jurisdiction and control, almost without question, from the foundation of the government. They have never asked the leave of the General government to make any erections in or over their waters which they might see fit to make, any more than to make and govern their own roads, railways and canals on the land. In one instance only (that of the Wheeling bridge), has that Government, by any department of it, interposed to take this jurisdiction out of the hands of a State, or to dictate the terms on which it should be exercised. And in that case, the legislative department of the government came, in the end, to the relief of the State, by a public Act, sanctioning, so far as Congress could sanction, the exercise of State sovereignty on the subject. The

result in that case has shown too, that the apprehensions of great and irreparable injury, whether to individuals, or to another State, from the exercise of this kind of sovereignty by a State over its own waters, were unfounded, since scarcely an appreciable injury, I believe, has been felt by anybody, from the Wheeling bridge, and nothing in comparison of the vast public benefit of the work. From the origin of the government, the States have gone on, in the exercise of their proper jurisdiction over their navigable waters, constructing or authorizing piers, wharves and bridges, all of them, in some sense and degree, encroachments on the channels and highways of navigation, as they originally existed. In some instances, the accustomed channels of navigable waters have been closed, or changed, by dams, through which navigation can only pass by means of locks. In the Cuyahoga bridge case, Mr. Justice McLean declared that this was a proper exercise of State authority. And where a navigable creek was wholly closed by a dam, the act of the State received the sanction of the Supreme Court. It did so in the case of the Blackbird Creek Marsh Company.

And thus far in the history of the country not a case has occurred, so far as I know, where this jurisdiction in the States has been abused, or in any manner employed to create unnecessary, improper or injurious obstructions to navigation in its own navigable waters. To admit the supposition that a State could be found capable of such wickedness or such reckless folly, would be to assume that such State is unfit, from moral degradation, to be a government at all, or to legislate for the affairs and interests of its own people.

That there shall be rivalries between States to secure each to itself the great currents of trade and travel

between distant points of great commercial importance, is to be expected. But in these cases each will look to attain success, not by obstructing, but by improving and facilitating navigation, and the means of transit through its own territory. And if a State draws to itself advantages in this respect over another State, by its superior systems of internal improvement, or its superior natural position, the public interests at large are not injured by it, and the rival State has no right to complain.

The distinction between the jurisdiction which a State properly exercises over its own waters, and the jurisdiction over commerce which belongs to the General Government, is a broad and palpable one. What are regulations of commerce in order to make commerce free, is easily understood. The object has been accomplished in this country by special provisions in the Constitution, and by the legislation of Congress, which takes from the States all power to restrict, annoy or burthen commerce by partial and conflicting measures, affecting the objects or subjects of commerce, or the vessels or agencies employed in transportation and carriage.

The regulations adopted by the European powers to secure the freedom of commerce on the Rhine, and other rivers, were of the same character as those contemplated by the Constitution to secure the freedom of commerce on the waters of the United States. The object was accomplished without touching the proper sovereignty of the separate riparian States over the waters within their limits, beyond the necessary restrictions on their right to impose separate duties and burthens on the objects or instruments of commerce. Each State for its own sake would keep the channel of commerce open and free within its own dominions, while making such erections therein as the interests of its own people demanded. That was left to the sovereignty and judgment of the State.

I do not say that a State has any rightful authority to shut up a river, of any considerable importance to the commerce of the country, by physical obstructions, even when exclusively within its own territory, if it runs to the sea. Unimportant streams or creeks may be thus closed for sufficient reasons of police or public policy. It would be a matter between the State and its own people. But in regard to rivers that are really important to commerce, I believe the country might exist under the Constitution for a thousand years, and no such case ever occur. It is quite impossible to suppose, on any reasoning applied to what we know of human conduct, that any such case should occur, so long as the States of the Union remain this side of revolution and open war.

In the case of a river which traverses or separates two or more States, and goes to the sea, I hold it to be equally improbable, and impossible, that the navigation should be closed by any one of the States. There is no conceivable ground of interest, or commercial policy, which should lead the State, holding the mouth of such a river, to shut up the navigation against the States above. Connecticut cannot now stop the produce of Massachusetts, Vermont and New Hampshire, descending the common river between them, at the north line of the State, or at the mouth of the river, and demand duties upon such produce, or send up its own produce or merchandize burthened with State taxes, for the consumers above to pay. It is the very freedom of commerce on such rivers, made thus free by the Constitution and laws of Congress, and with which no State can interfere, that perfectly secures the freedom of navigation upon them, without taking from the States their sovereignty and jurisdiction over them, so necessary to the proper exercise of their powers of local government and police, and to those public improvements which are indispensable to their prosperity.

But if it be thought possible that a State next to the sea, on any ground of interest, or even in a spirit of hostility or injury to a State above, on a river common to them both, should close the navigation between itself and the State above, I suppose it would not be a case altogether beyond judicial cognizance and redress. Imagine the Connecticut river closed by a dam at the boundary between Connecticut and Massachusetts. Here would be "a controversy between two or more States"—a case to which the jndicial power of the United States extends, with original jurisdiction in the Supreme Court.

It is not doubted that this jurisdiction was given mainly with reference to disputed boundaries, or titles, between States. But the power is general, and may be applied to a controversy between States in respect to a right of navigation in a common river, as well as to a question of boundary. In questions of boundary, the Court takes cognizance of the cases on the express authority of the Constitution, and decides them upon the laws and usages of nations in disputes of that kind. (Opinion of Ch. J. Taney, in Wheeling Bridge case, 19 Curtis, p. 647.) A controversy between States in regard to the right of navigation on a common river, would also stand on the laws and usages of nations.

And in such a case, I suppose the right of the injured State would be clear. The United States have always maintained that the right of navigation on a river traversing, or separating, several independent States, and running to the sea, was a natural right in all such States, and was so held by the laws of nations. The States above have a right to an open passage to the sea, subject only to the authority of the States below to guard themselves against injury or serious danger. That was the right always maintained by the United States to the free navi-

gation of the Mississippi while Spain held the mouth of that river. And they have earnestly contended for the same right of free navigation on the St. Lawrence. If that is an American doctrine of international law as applicable to independent nations, much more is it applicable to the States of this Union, where the Constitution makes all commerce between them free, and thus greatly strengthens the obligation upon such of them as are below on common rivers, to keep the navigation of such rivers open and free to those States above which have a right to use them, even by the laws and usages of nations.

But, for myself, I do not hold it to be a supposable case that any such violation of the rights of navigation can ever occur, so long as the peace of the Union shall be preserved. The States must go far beyond the line of innocent rivalries under the Constitution—they must become hostile States, and enemies, before they can enter upon measures which can have no object but to see which can do the other most harm. An invasion of one State by the forces of another might as properly be anticipated. If the time should ever arrive when States of this Union shall come into collision, and madly indulge in acts of mutual hostility, it will be time enough then to consider how far the power of the general government may be employed, and in what form, under the Constitution, to meet the difficulty. Failing that, the conflicting and warring sovereignties of the country must be left to find, or make, an issue of peace for themselves, if they can, in their own way. When wars come to be flagrant, laws will of course be silent.

It is not necessary that I should say a word to this Court of the great importance of this principal question of power as between the National and State governments, on which I have now offered my views. If it belongs to

the National Government, it is a power which, if once entered upon, has no assignable limit. It is impossible to say where it would end. Certainly, the power being conceded, if we could suppose it possible it should ever be exercised to the full extent to which it might be carried, if once begun, it would leave the States little more than the shadow, and not a great deal of the substance, of sovereignty. Especially would they be stripped of power for some of the highest and most beneficent purposes of government, as thus far employed by them. Those works of public improvement which have been so extensively and happily prosecuted, and which are still carried forward, by the separate States of this Union, or under their authority, and which together constitute a connected system of vast extent and magnitude, and of incalculable value and importance to the nation, and which the National Government never would, and never could have prosecuted as they have been prosecuted by the States, or under their guardianship and power; how much of all these works, these noble signs and instruments of civilization and progress all over the country, would have existed to-day, if Congress had undertaken to press the commercial power conferred upon it, both on the land and on the water, to any thing like the dangerous extent to which it might certainly have been carried, if once entered upon, and acquiesced in? Nobody can say that the attempt would not have been most disastrous.

Fortunately, as I venture to think, and as I have endeavored to convince the Court, Congress does not possess this power over the highways of general commerce, so that in whatsoever might affect their condition and availability for the uses of commerce, the General Government might, if it would, command as sovereign over them all, to the exclusion of the States. Happily,

too, as I venture to think, and as I have endeavored to convince the Court, if Congress does possess this power, it has never exercised it. Certainly, as it seems to me, it has wholly refrained, by a settled and unbroken policy, from any attempt to push the commercial power to the extent of controlling, in any degree whatever, State legislation over the navigable waters within State limits, in respect to any works of public improvement in or over them, which a State might think the public interests demanded at its hands. If such has been the policy of Congress, from which it has not departed by any Act of legislation whatever, this Court, I am sure, if so convinced, will be quite satisfied and content not itself to disturb that policy, even if it had the power to disturb it.

With a country already so expanded as ours has become since the Constitution was framed, and destined, perhaps, to embrace still other and more distant regions and peoples, the problem of maintaining such a frame of National Government as the Constitution establishes, in necessary vigor, and, at the same time, in harmony with the separate political Communities which make up the Union, multiplied and multiplying as these separate Communities are, is one which no patriot mind, whether of jurist or statesman, can contemplate without the profoundest anxiety. No thinking man, I imagine, can be found at the present day, who supposes that our Federal system could be maintained at all, but for that ample measure of sovereignty for local government which the Constitution so happily leaves in the hands of the States. Every one, I suppose, now sees that any further weakening of the States, to add strength to the National Government, would have been fatal. The security of the system rests in the fact that every State is, and feels that it is, a real sovereignty and a real government, endowed with original powers, for all that most intimately concerns the welfare and happiness of

the people of such State, and is not a mere municipal Corporation with a modicum of authority borrowed from an imperial Power to which it owes its existence.

Nothing, in my judgment, could be more entirely fatal to our system than any disturbance, at the present day, by Constitutional interpretations, of the nicely adjusted balance of powers between the National and State Governments, as fixed by the Constitution. Both must have their own, and nothing which is not their own. And it must needs be remembered that the prerogative of the National Government, which makes it the interpreter and final adjudicator of its own powers, while it is an indispensable, is yet a fearful authority. It is not in the nature of any government voluntarily to abdicate or repudiate any of its just powers. Happy, thrice happy, if the General Government, marching up fully to this line, shall take care not to pass it by so much as the breadth of a hair. But what moderation, what forbearance, what lofty justice, what noble virtue, does not all this demand! And it is this Court to which the country must look as the grand exemplar of these high attributes.

This Court occupies a position of higher dignity, and of more awful responsibility, than attaches, or ever attached, to any other Judicial Tribunal on earth. While it cannot lift a finger of authority, except to administer the law of the land as between litigant parties immediately before it, precisely in the manner of the humblest tribunal of justice, yet, such is the nature of the jurisdiction it is sometimes called upon to exercise, the governments of the country, State and National, the States themselves, and the United States, are, at times, in effect, summoned into its august presence, and dismissed with its authoritative decrees resting upon them. Sublime as this power is, it is not greater than necessity demands; and on its strict preservation depends, in my